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IN THE

Supreme Court of the United States

October Term, 1969.

No. 1 0 .

THOMAS K. GILHOOL, et al.,

Appellants,

v.

CHAIRMAN AND COMMISSIONERS, PHILADELPHIA COUNTY BOARD OF ELECTIONS, et al.,

Appellees.

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

JURISDICTIONAL STATEMENT.

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INDEX.

	Page
Opinion Below	2
Jurisdiction	2
Statute Involved	2
Questions Presented	4
Statement	5
The Questions Are Substantial	8
Conclusion	19
Appendix A—Opinion and Order of U. S. District Court for the Eastern District of Pennsylvania	21

CITATIONS.

Cases:

	Page
Avery v. Midland, 390 U. S. 474 (1968)	14
Carrington v. Rash, 380 U. S. 89 (1965)	16
Hall v. Beals, — U. S. —, 90 S. Ct. 200 (1969)	2, 9
Moore v. Ogilvie, 394 U. S. 814 (1969)	2, 9
Rinaldi v. Yeager, 384 U. S. 305 (1966)	16
Shapiro v. Thompson, 394 U. S. 618 (1969)	16
Voorhes v. Dempsey, 231 F. Supp. 975 (D. Conn. 1964), affirmed, 379 U. S. 648 (1965)	10, 12
Williams v. Rhodes, 393 U. S. 23 (1968)	9, 10, 12

Constitution, Statutes, Rules:

	Page
U. S. Constitution, Amendment I	8
U. S. Constitution, Amendment XIV, Sec. 1	8
5 Conn. Stat. Ann. § 9-242	8
2 Ann. Laws of Mass., C. 54, § 33	8
14A Minn. Stat. Ann. § 206.01	8
19 N. J. Stat. Ann. § 19:48-1	8
17 McKinney's Cons. Laws of N. Y. Ann. § 105	8
25 Purdon's Pa. Stat. Ann. § 3010(h)	2, 5
9 Vernon's Civil Stat. of Texas Ann., Art. 7.14, § 8	8
28 U. S. C. § 1253	2
28 U. S. C. § 1331	2
28 U. S. C. § 1343(3)	2
28 U. S. C. § 2101(a)	2
28 U. S. C. § 2281	2
Fed. R. Civ. P. 65(a)(2)	4, 18

CITATIONS (Continued).

Other Authorities:

Page

Campbell, Convers, Miller, and Stokes, *The American Voter* (1960) 16

Campbell and Miller, "The Motivational Basis of Straight and Split Ticket Voting", 51 American Political Science Review 293 (1957) 15, 16

Key, *Politics, Parties, and Pressure Groups* (5th ed. 1964) ... 14

Walker, "Ballot Forms and Voter Fatigue, An Analysis of the Office Block and Party Column Ballots", 10 Midwest Journal of Political Science 448 (1966) 13

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

JURISDICTIONAL STATEMENT.

Appellants appeal from the order of the three-judge United States District Court for the Eastern District of Pennsylvania, entered on October 17, 1969, dismissing plaintiffs' complaint in this case and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW.

The opinion of the District Court for the Eastern District of Pennsylvania, constituting the court's findings of fact and conclusions of law, is not yet reported and is attached hereto as Appendix A, *infra*, p. 21.

JURISDICTION.

This action was brought under 28 U. S. C. secs. 1331 and 1343(3) to declare unconstitutional and to enjoin the requirement of the Election Code of the Commonwealth of Pennsylvania, 25 Purdon's Pa. Stat. Ann. sec. 3010(h), that a straight party lever be provided on voting machines. A three-judge district court was required to hear and determine the action under 28 U. S. C. sec. 2281. The opinion of the District Court was filed on October 14, 1969, judgment was entered on October 17, 1969, and a notice of appeal was filed in that court on November 12, 1969. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U. S. C. secs. 1253 and 2101(a). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Moore v. Ogilvie*, 394 U. S. 814 (1969); *Hall v. Beals*, — U. S. —, 90 S. Ct. 200 (1969).

STATUTE INVOLVED.

25 Purdon's Pa. Stat. Ann. sec. 3010(h) requiring the use of straight party levers on voting machines, provides as follows:

> The names of all candidates of a political party shall appear in the same row or column, and no other

names shall appear in the same row or column, to the left or top of which shall be a straight party lever, by means of which an elector may, in one operation, vote for all the candidates of that political party for every office to be voted for. The names of such candidates shall be arranged under or opposite the title of the office for which they are candidates, and shall appear in the order of the votes obtained by the candidate for Governor of the party nominated at the last gubernatorial election, beginning with the party obtaining the highest number of votes: Provided, however, That in the case of parties or bodies not represented on the ballot at the last gubernatorial election, the names of the candidates of such parties shall be arranged alphabetically, according to the party or body name. The names of all candidates of a political body shall appear in the same row or column, and, if the number of parties and bodies permits, each political body shall be entitled exclusively to a separate row or column, with a straight party lever. If, however, the number of political parties and political bodies renders it impossible or impracticable to so arrange the political bodies, in such case said bodies shall not be entitled to a separate row or column and a straight party lever, but shall be listed by political appellations on the first left hand or top row with the designating letter and number of the ballot label where their candidates may be found, together with the political appellations of other political bodies, whose candidates may be interspersed on the same row or column. Subject to the aforesaid limitations, the form and arrangement of ballot labels, as to the placing thereon of political bodies, shall be within the discretion of the county board.

QUESTIONS PRESENTED.

1. Whether the requirement by the State that straight party levers be provided on all voting machines unconstitutionally discriminates against independent candidates and in favor of party candidates for the same office?

2. Whether, after the district court had denied appellants' application for a preliminary injunction on the ground that appellants' proof at the hearing on the application had failed to establish discrimination, the court erred in dismissing appellants' complaint for declaratory and permanent injunctive relief without giving appellants the opportunity to prove discrimination at the trial on the merits, when the court had never ordered the trial on the merits advanced and consolidated with the hearing on the application for preliminary injunction pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure (nor had the appellants stipulated to such a consolidation)?

STATEMENT.

Appellants are independent candidates for City Council in the City of Philadelphia (i.e., candidates not part of a party "ticket" presenting candidates for all or most of the offices to be voted for by electors) and voters who wish to elect them, or other independent candidates for City Council, to office (App. A, *infra*, p. 21). They brought this suit to challenge the requirement of the Pennsylvania Election Code, 25 Purdon's Pa. Stat. Ann. sec. 3010(h), that straight party levers be provided on voting machines at the top of each party column "by means of which an elector may, in one operation, vote for all the candidates of that political party for every office to be voted for." Appellants allege that this party lever requirement constitutes a serious discrimination against independent candidates for offices, such as City Council, which appear at a low position on the ballot, and in favor of candidates for such offices who run as part of a party ticket and that such discrimination is not justified by any sufficient governmental interest (App. A, *infra*, p. 24). Declaratory and preliminary and permanent injunctive relief was sought (Complaint, Para. 22, pp. 15-16).

The suit was brought on September 11, 1969, six days after elections for City Council in Philadelphia were called to take place on November 4, 1969 (App. A, *infra*, p. 21). Defendants (now appellees) are the officials charged with enforcement and application of the State Election Code provision relating to the form of the ballot. The Philadelphia County Democratic Executive Committee and the Republican City Committee, the two political organizations benefiting from the straight party lever requirement, were permitted to intervene as parties defendant (App. A, *infra*, pp. 23-24). A three-judge district court was convened and a hearing on appellants' application for preliminary injunc-

tion was held on September 24, 1969 and adjourned until October 6, 1969.[1]

On October 14, 1969, the district court denied appellants' application for preliminary injunctive relief on the ground that appellants had adduced "no testimony" at the hearing on the application for preliminary relief "to show that, where all parties and bodies had a straight party lever above their respective columns on the ballot, one desiring to vote for any of the independent candidates would in some way be deterred from so doing by the mere existence of a party lever appearing at the head of the Republican and Democratic columns." (App. A, *infra*, p. 27).[2] Studies of voter behavior presented to the court by appellants in the application for preliminary injunction showed, the court found, "that, in the elections studied, candidates appearing below the top of the tickets tend to get more votes in states where party levers are used than they do in states where party levers are not used," (App. A, *infra*, p. 28). These studies nevertheless were disregarded by the court on the

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1. The second hearing on appellants' application for preliminary injunction was required when, at the end of appellants' presentation of evidence of discrimination inherent in the proposed ballot on September 24, defendants announced that neither the form of the proposed ballot nor the accompanying instructions were yet final (App. A, *infra*, p. 25). The final prepared form of ballot was not presented to the court or appellants by defendants until the October 6 hearing. The final prepared ballot differed from that defendants originally prepared. (App. A, *infra*, pp. 25-27). No evidence as to discrimination in the ballot was received after the defendants' final proposal was submitted on October 6.

2. Appellants presented two expert witnesses at the hearing on the application for preliminary injunction. One witness stated his opinion that "the party levers would result in the regular party candidates getting more votes than they would get if party levers were not used"; this testimony was disregarded on the ground that it was "unsupported by reference to any persuasive data" (App. A, *infra*, pp. 27-28, n. 7). Appellants' other expert testimony was not persuasive, in the court's opinion, because "addressed to the original layout of the ballot, which, as we now know, will not be used in the November 4th election." (App. A, *infra*, p. 32).

grounds of hearsay and that the studies were concerned with different types of elections than those in Philadelphia for City Council and also on the ground that "none of the studies suggest that the well-informed, motivated voter would be in any way affected by the presence of party levers. They also tend to indicate that the removal of the party lever would discriminate against poorly educated voters by depriving them of an opportunity to vote for the candidates of their political party in a convenient way," (App. A, *infra*, p. 29). The court concluded "that the plaintiffs have failed to sustain their burden of proving that the use of party levers in this election attains the dimension of an 'invidious discrimination' proscribed by the Federal Constitution," (App. A, *infra*, p. 29).

Having concluded that appellants were not entitled to preliminary injunctive relief directed toward the November 4, 1969 election on the basis of the proof adduced by them at the hearing requesting preliminary relief, the court proceeded directly and finally to dismiss appellants' claims for declaratory and permanent injunctive relief as well (App. A, *infra*, p. 34). This action was taken despite the facts that the court had never acted under Rule 65(a)(2) of the Federal Rules of Civil Procedure to advance the trial on the merits and consolidate it with the hearing on the application for preliminary injunction and that appellants had never entered into a stipulation to that effect.

THE QUESTIONS ARE SUBSTANTIAL.

This appeal challenges the constitutionality under the First and Fourteenth Amendments of the requirement of the Pennsylvania Election Code that straight party levers must be provided on voting machines at all general elections within the State. Through such levers a voter wishing to vote a straight party ticket (i.e., to vote for all the candidates put up by a single party for all contested offices—local, state and national) may do so by pulling a single large party lever located at the head of each column of party candidates.[3] A voter not voting on the basis of party but wishing to allocate his votes among or between candidates of different parties for various offices, or a voter wishing to vote for any independent candidate not part of a party "ticket", may not cast his votes through use of a single large lever at the top of the voting machine, but must depress a number of individual levers next to the candidates of his choice. The official voting instructions in Pennsylvania emphasize straight party voting through party levers by listing and describing this form of voting first in the description of how to use the voting machines (App. A, *infra*, pp. 24-25, n. 5).

Appellants contend that the provision under State law of a special simple voting procedure, which may be used only by voters willing to vote for all the candidates of a single party, but not by voters wishing to vote for independent candidates or to vote for candidates regardless of their party affiliation, constitutes unjustifiable state

3. The Pennsylvania party levers are about five times the size of the levers next to individual candidates. Similar straight party levers are provided in several states, such as Connecticut (5 Conn. Gen. Stat. Ann. § 9-242) and Texas (9 Vernon's Civil Stat. of Texas Ann., Art. 7.14, § 8), while other states, such as New York (17 McKinney's Cons. Laws of N. Y. Ann. § 105), Minnesota (14A Minn. Stat. Ann. § 206.01), New Jersey (19 N. J. Stat. Ann. § 19: 48-1), and Massachusetts (2 Ann. Laws of Mass., C.54, § 33), have eliminated straight party levers from their voting process.

favoritism of party candidates and consequent discrimination against independent candidates for office. Such discrimination is contrary to this court's holding in *Williams v. Rhodes*, 393 U. S. 23, 31 (1968), that heavier mechanical burdens may not be imposed upon independent political candidates or their supporters than upon party candidates, unless such burdens are supported by "compelling state interest."

1. The case is not moot. The case was brought to prevent the use of straight party levers at the November 4, 1969, elections for City Council in Philadelphia. Although that election is over, the Pennsylvania Election Code continues to require the presence of straight party levers on all voting machines. Moreover, the time period available in which to challenge this provision immediately prior to each election where it applies, after all candidates have been qualified and the form of ballot established, is insufficient to permit full judicial consideration, including appellate review. The case is thus on all fours with *Moore v. Ogilvie*, 394 U. S. 814 (1969), where, as here, the case was not moot because the challenged practice under State law was "capable of repetition, yet evading review." Compare *Hall v. Beals*, — U. S. —, 90 S. Ct. 200 (1969), where the Court, two Justices dissenting, held a challenge to a state election provision moot because the challenged law had been changed and the plaintiffs' status had changed so that they no longer were adversely affected by the law. Here, all independent candidates and their supporters will continue to be affected at every future election so long as the Election Code continues to require straight party levers. In addition, the class of plaintiffs here consists, not only of particular candidates at the 1969 election and their supporters, but also of persons generally supporting independent candidates for office (See Complaint, Para. 7, p. 4). The interest of these

plaintiffs in the outcome of the case is not in the least diminished by the occurrence of the 1969 election.

2. Party levers required by state law constitute a substantial governmental discrimination against independent candidates. These levers provide an especially simple, fast and convenient form of voting, but this means of voting is available only to persons wishing—or willing—to cast all their votes for the candidates of a single party ticket. Party levers do not provide convenience for voters inclined to vote for independent candidates or for candidates of different parties for different offices. That is, there are no single levers available in the voting machines to select combinations of candidates from different parties, or to select combinations of independent candidates with party candidates. Single lever voting is available only to persons engaging in voting by party affiliation.[4]

Through providing party levers, therefore, the State makes one way of selecting candidates for whom to vote—that of selecting all the candidates of a single party—the simplest, fastest and most convenient way to vote. Such special State facilitating of a particular way of selecting candidates for whom to vote, which aids only candidates running as part of a party ticket, is, we submit, a clear violation of the requirement of *Williams v. Rhodes, supra*, that the State not favor party candidates over independents absent a "compelling justification". While *Williams* dealt only with discriminations toward independents seeking admission to the ballot, clearly the same principle applies to

4. The District Court stated that because all independent candidates were also given a large lever in the instant case, "there is even less disadvantage to the independent candidates than there was in the *Voorhees* (sic) case," (App. A, p. 31). The large lever serves no function in voting for a candidate who runs independently—not as part of ticket with candidates for all offices. In the present case, for example, the party lever registered choices for twenty offices whereas use of the large lever for appellant registered a choice for but one office.

bar discrimination favoring party candidates in the voting process itself.

The discriminating impact inherent in the provision by the State of special levers for straight party voting, which cannot be used by voters selecting candidates regardless of party, can most easily be seen by considering what the situation would be if the State provided a party lever for only one party, but not for others with candidates on the ballot. Such selective provision of a convenient way of voting simultaneously for all the candidates of one favored party—but not for the candidates of other parties—would certainly be deemed an impermissible State discrimination among parties. The provision of levers to facilitate all straight party voting works, we believe, an exactly identical discrimination, except that the discrimination here is not among parties but in favor of all party candidates and against all independents.

Discrimination occurs since voting for candidates because they are on the ticket of one's party preference is but one basis for voter choice; it is equally permissible to vote for candidates regardless of party affiliation because of individual merit. Independent candidates who do not run as part of a party ticket must rely exclusively upon the latter type of voter—that is, one who votes for individual candidates on their own merits rather than for all the candidates of one party—for their support. When the State provides an especially easy way to vote for candidates by party it biases the voting process in favor of voting for candidates by party. This discriminates against independent candidates, for whom one cannot vote by party, just as forcefully as it would discriminate against Republican candidates if the voting machine were set up to provide a single lever for voting by party only for Democratic candidates, requiring individual voting for all candidates of the Republican and other parties.

3. Voting machines incorporating the straight party lever not only constitute a state favoritism towards a basis of voting which cannot apply to independent candidates, it also inevitably affects the number of votes an independent candidate for lower office actually receives *vis-à-vis* his party counterpart. The use of a straight party lever actually changes the vote which will be cast as compared with the vote which would be cast on machines which do not employ such a lever.[5]

The bias occurs in a number of ways. In the first place, because of time and other pressures, voters not very strongly motivated toward particular candidates of different parties are encouraged to adopt straight party voting, if a party lever is available to them, simply because it is the easiest way to vote. This effect is documented by Campbell and Miller in "The Motivational Basis of Straight and Split Ticket Voting", 51 American Political Science Review 293 (1957). This study considered the discrepancy in the popular vote for President Eisenhower and for Congressmen in the 1956 elections:

> Whatever relationships we find between the political motivations of the voters and the way they mark their ballots, *it is clear that the form of the ballot itself has an influence on the proportion of straight and split tickets cast.* This becomes evident when we divide our sample into those voting in states with the single choice

5. The challenge to Connecticut's straight party lever in *Voorhees v. Dempsey*, 231 F. Supp. 975 (D. Conn. 1964), affirmed without opinion, 379 U. S. 648 (1965), did not raise the issue presented here. The complaint in that case did not allege, nor did the jurisdictional statement assert, nor of course was there any proof, that the straight party lever changed votes. Indeed, the only issue raised by the class of voters plaintiffs in *Voorhees* was that voting for independent candidates was more time consuming and required more effort. That case did not even pose the question of association, here raised by plaintiffs independent candidates and their supporters, and, after *Voorhees*, held decisive in *Williams v. Rhodes*.

> type of straight ticket voting and those in which a straight ticket requires more than one mark on the ballot. Of the Eisenhower voters in the single choice states, 59 per cent voted a straight ticket; in the other states it was 48 per cent. Of the Stevenson voters in the single choice states, 69 per cent voted a straight ticket; 60 per cent voted a straight ticket in the multiple choice states. Since the distributions of party identifiers in the two types of states do not differ we must conclude that *the sheer ease of voting a straight ticket facilitates this type of voting. Id.* at 299, 300. (Emphasis supplied.)

An analysis of 1964 data showed the same patterns concerning split tickets as were found in the 1956 data. Walker, "Ballot Forms and Voter Fatigue, An Analysis of the Office Block and Party Column Ballots," 10 Midwest Journal of Political Science 448, 450 (1966).

Another result of the straight party lever is to give a "bonus" vote to party candidates that they would not ordinarily receive. The reason for this is simply that voters who do not utilize a straight party lever often tire or otherwise do not vote for the lower offices unless they are strongly motivated to do so. A large "fall off" in votes results toward the bottom of a ballot where party levers are not available:

> The number of expressions of opinion demanded of the American voter constitutes a greater burden than is borne by any other voter in the world. The ballot is so long, in fact, that the voter waives and often refrains from voting on offices or measures toward the bottom. Not uncommonly, as many as 25 to 30 percent of those voting fail to make a choice on obscure constitutional amendments, and the less conspicuous offices almost invariably attract a far lower vote than do the offices at

the head of the ticket. In the larger states these partial nonvoters may number in the hundreds of thousands.

V. O. Key, *Politics, Parties, and Pressure Groups*, 646 (5th ed. 1964).

On the other hand, where the straight party lever is available, voters using such levers automatically vote for all of a party's candidates down to the bottom of the ticket, thus eliminating any "fall-off" for such party voters. This kind of bonus vote cannot go to independent candidates at the bottom of a ticket who receive only those votes intentionally cast for them by the pulling of their individual levers.[6]

The district court found that discrimination had not been shown by appellants because it found no evidence that well-informed, motivated voters would be deterred from voting for independent candidates by straight party levers or otherwise have their vote affected. (See Statement, *supra*, p. 7.) We do not quarrel with the finding that the well-informed or strongly motivated voters would vote identically whether or not party levers were present. The fact is, however, that because of the factors just described, voters of marginal motivation will have their votes affected by the presence of straight party levers. A significant number of these voters would split their tickets—or vote for independent candidates—if the significantly easier way of voting "straight party" were not available. Other marginally motivated voters would not vote at all for lesser offices if party levers were not present; with party levers they vote for such offices, but only for party candidates for such offices. This effect of party levers upon voters of low

6. This discrimination and the unreasoned, bonus vote it brings to party candidates bear especially in contests for office in local government, for such elections are characteristically ranged at the bottom of the ballot. *Cf. Avery v. Midland County*, 390 U. S. 474 (1968).

or marginal motivation is also documented by Campbell and Miller:

> For the extreme party identifiers (Strong Republicans and Strong Democrats), the ballot form has no discernible effect on whether or not they vote a straight ticket. Strong Republicans using multiple choice ballots still vote a straight ticket just as frequently as do Strong Republicans who can cast a party vote with a single "X" or by pulling a single party lever; the same is true of Strong Democrats. Among weak identifiers, Independents, and among identifiers whose presidential vote is in conflict with their party identification, the form of the ballot plays a progressively more and more important role in facilitating or inhibiting straight ticket voting. Campbell and Miller, at 307.

They conclude

> The fact that the American ballot system permits the voter to choose an entire party slate with a single decision, and in a large proportion of the cases with a single movement of a pencil or voting machine lever, introduces an additional factor into the explanation of the vote. If the voter were compelled to go through the individual positions on the ballot, making independent decisions on each one separately, we would expect the unmotivated voter to be very unlikely to vote a straight ticket. Not being guided by any general political motive according to which he could organize the entire ticket he would presumably be influenced by a variety of unrelated considerations that would take him haphazardly from one side of the ballot to the other. The fact is, however, that we find a substantial number of straight tickets among voters who seem to have no partisan commitment to either parties, candidates, or issues. To explain their presence in our

> data we must invoke a second motivational principle, *the tendency toward least effort*. We conclude that in the absence of relevant political motivation, these people are voting a straight ticket *because* the peculiarities of the voting system make a straight ticket vote the easiest way for them to complete the task of voting. The more the ballot form facilitates the marking of a straight ticket, the more likely they are to choose this alternative. Campbell and Miller, at 311. (Emphasis supplied).

See also Campbell, Converse, Miller and Stokes, *The American Voter* (1960), wherein are gathered the definitive voter studies of the Survey Research Center of the University of Michigan.

Such discrimination against independent candidates through effects upon the votes cast by a significant portion of voters (perhaps even a majority) who do not enter the voting booth with strong motivation toward particular candidates or parties, is constitutionally impermissible unless justified by a strong counterbalancing governmental interest.

4. The only justification ordinarily suggested for the use of the straight party lever is that it simplifies and speeds up the voting process. The difficulty with this rationale is that the straight party lever simplifies and speeds up the process only for voters wishing to vote a straight party ticket. It is this very fact which causes its effect upon the votes cast by marginally motivated voters. The State, we believe, is not entitled to introduce for reasons of administrative convenience a device which makes the voting process simple and quick only for voters selecting party candidates. In such circumstances administrative convenience does not constitute a compelling interest. *Carrington v. Rash*, 380 U. S. 89 (1965); *Rinaldi v. Yeager*, 384 U. S. 305 (1966); *Shapiro v. Thompson*, 394 U. S. 618 (1969).

The party lever is not necessary in order to enable voters who wish to do so to vote a straight ticket. The party affiliation of candidates is clearly marked on the ballot and, in addition, Pennsylvania places all candidates of a given party in the same column thus further facilitating straight party voting by those who wish to vote a straight ticket. This ballot form arguably serves a legitimate purpose of helping voters easily to identify party candidates for whom they may wish to vote, while, not, in and of itself, making it easier to vote a straight ticket than a split ticket. On the other hand, the straight party lever serves no necessary purpose of clarifying the ballot for voters, while its favoritism toward straight party voting biases the vote against independent candidates.

In one situation there might be a strong—perhaps a compelling—state interest on the side of favoring party candidates for lower offices in the manner achieved by party levers in Pennsylvania. If an election involved the choice of a full "team" of elected officials to govern a political unit, a governor and members of the legislature, for example, or a mayor and city councilmen, one might argue that the benefits of having full cooperation among the elected officials would permit a State to encourage the election of persons all or most of whom belonged to the same party. Party levers might thus be justified as an attempt to encourage voters to choose members of the same party and to elect a unified slate to govern. But the Pennsylvania Election Code is not so narrowly drawn; it permits, indeed requires, the use of the straight party lever to join contests for offices in no way rationally related to each other. There is no conceivable basis for the State to encourage the election of persons from the same party to the posts of Supreme Court Judge and Philadelphia City Council, as the party levers did in November, and will continue to do.

5. Not only was the application for preliminary relief denied below but the complaint was dismissed forthwith, for the court "concluded that plaintiffs have failed to sustain their burden of proving that the use of party levers attains the dimension of an 'invidious discrimination' proscribed by the Federal Constitution," (App. A, *infra*, p. 29). If the dismissal rested on the judgment that even if the factual burden had been carried by appellants no cause of action was stated, there is substantial question, as we have urged above, that the dismissal was error. If, on the other hand, the dismissal rested on the judgment that appellants had failed to carry their factual burden, appellants were prematurely denied the opportunity of proof, and the cause should be remanded for trial on the merits. The court had never acted under Rule 65(a)(2) to advance the trial on the merits and consolidate it with the hearing on preliminary injunction and appellants had never entered into a stipulation to that effect.

Appellants are, in fact, prepared to offer substantial additional expert testimony and evidence showing the discriminatory effect of straight party levers against independent candidates for lessor offices, should such a showing be deemed necessary to demonstrate the unconstitutional effect of straight party levers in this case. Such evidence, much of it from expert academic witnesses located at a considerable distance from the place of the hearing, could not be presented to the court in the short period between the defendants' finalization of the form of ballot for the November 4, 1969 election and the last date on which the district court could have effectively ordered a change in the November, 1969, ballot.

CONCLUSION.

The questions presented by this appeal are substantial. Probable jurisdiction of the appeal should be noted or, in the alternative, the order of the court below should be vacated and the cause remanded for trial on the merits.

Respectfully submitted,

PAUL BENDER,
DONALD JOSEPH,
Counsel for Appellants.

APPENDIX A.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION NO. 69-2139.

THOMAS K. GILHOOL, ET AL.

v.

CHAIRMAN AND COMMISSIONERS, PHILADELPHIA COUNTY BOARD OF ELECTIONS, ET AL.

OPINION OF THE COURT

Before KALODNER, *Circuit Judge*, HIGGINBOTHAM and MASTERSON, *District Court Judges*

MASTERSON, *J.*

Plaintiffs brought this action to enjoin the City of Philadelphia "from preparing or utilizing voting machines or ballots employing straight party voting levers for the offices of Councilman in the First and Seventh Councilmanic Districts in the special elections to be held in those Districts in Philadelphia on November 4, 1969, or from conducting the election in any other manner causing discrimination against independent candidates for Councilman, their supporters, or electors wishing to vote for such candidates."

The plaintiffs are residents and electors of the First and Seventh Councilmanic Districts of the City of Philadelphia. The purpose of the special election in question is to fill vacancies which have occurred in the office of councilman in these districts. Pursuant to writs of election issued on September 5, 1969, by the President of City

Council, the special elections are scheduled to be held in conjunction with the regular municipal election on November 4, 1969.

In their complaint, the plaintiffs requested the convening of a district court of three judges on the ground that the injunctive relief sought would restrain the enforcement, operation and execution of state statutes of state-wide application, namely, the Election Code of the Commonwealth of Pennsylvania, as amended, 25 Purdon's Pa. Stat. Annot. §§ 2787 and 3010(h).[1] Pursuant to 28 U. S. C. § 2281,[2] a

1. Section 2787 provides:

Every special election, held under the provisions of this article, shall be held and conducted in all respects in accordance with provisions of this act relating to November elections, and the provisions of this act relating to November elections shall apply in so far as applicable, and not inconsistent with any other provision of this act. All such special elections held at the time of a regular primary or November election shall be conducted by the election officers by the use of the same equipment and facilities, so far as practicable, as are used for such primary or November election.

Section 3010(h) provides:

The names of all candidates of a political party shall appear in the same row or column, and no other names shall appear in the same row or column, to the left or top of which shall be a straight party lever, by means of which an elector may, in one operation, vote for all the candidates of that political party for every office to be voted for. The names of such candidates shall be arranged under or opposite the title of the office for which they are candidates, and shall appear in the order of the votes obtained by the candidate for Governor of the party nominated at the last gubernatorial election, beginning with the party obtaining the highest number of votes: Provided, however, That in the case of parties or bodies not represented on the ballot at the last gubernatorial election, the names of the candidates of such parties shall be arranged alphabetically, according to the party or body name. The names of all candidates of a political body shall appear in the same row or column, and, if the number of parties and bodies permits, each political body shall be entitled exclusively to a separate row or column, with a straight party lever. If, however, the number of political parties and political bodies renders it impossible or impracticable to so arrange the political bodies, in such case said bodies shall not be entitled to a

three judge court was convened and a hearing was scheduled for September 24, 1969. Prior to the hearing, motions to intervene as party-defendants were made by the Philla-

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separate row or column and a straight party lever, but shall be listed by political appellations on the first left hand or top row, with the designating letter and number of the ballot label where their candidates may be found, together with the political appellations of other political bodies, whose candidates may be interspersed on the same row or column. Subject to the aforesaid limitations, the form and arrangement of ballot labels, as to the placing thereon of political bodies, shall be within the discretion of the county board."

2. For section 2281 to be applicable, the following requirements must be fulfilled:

(1) a state statute must be challenged;

(2) a state officer or local officer performing a state function must be a party defendant;

(3) injunctive relief must be sought;

(4) it must be claimed that the statute is contrary to the Constitution.

There is no problem in this case with requirements (1), (3) and (4). The Pennsylvania Election Code is a state statute of statewide application and the plaintiffs are seeking injunctive relief, claiming that certain Election Code provisions are violative of the First and Fourteenth Amendments to the Federal Constitution. The problem is with the second requirement—that the parties-defendant be state or local officers performing a state function.

The named defendants here are the Philadelphia County Board of Elections and its Chairman and Commissioners. The Board is established pursuant to state law (25 Purdon's Statutes § 2641) and its powers and duties are defined by state law (25 Purdon's Statutes § 2642). It is clear under the decided cases that, whether these officials be denominated as state or local officers, the crucial issue for the purpose of deciding whether a three judge court should be convened is whether these officials are performing a local or state function in carrying out the actions which the plaintiffs seek to enjoin. See, e.g., *Moody v. Flowers*, 387 U. S. 97 (1967); *City of Cleveland v. United States*, 323 U. S. 329 (1945); *Spielman Motor Sales Co. v. Dodge*, 295 U. S. 89 (1935). Since plaintiffs are here attacking the use of a straight party lever which is required to be used pursuant to the State Election Code, and since the ballot for November 4th includes elections for both statewide and local offices, we have concluded that the defendants are performing a state function when they place a straight party lever on the voting machines. Hence, they are state officers within the meaning of 28 U. S. C. § 2281.

delphia County Democratic Executive Committee and the Republican City Committee and the motions were granted by the Court.[3]

At the initial hearing, the plaintiffs' complaint was three-pronged: (1) they averred that the use of a straight party lever, which permits a voter to vote for all the candidates of a party by turning a single large lever above the column in which the party's candidate appears, unconstitutionally favors the major parties and results in a discrimination against candidates of other political parties and bodies; (2) plaintiffs also contended that the physical layout of the ballot allegedly proposed for the special election in the First Councilmanic District discriminated against the so-called independent candidates since all the independent candidates' names were arranged vertically on the far right side of the ballot, whereas the major parties' candidates for the same office would appear horizontally on the left of the ballot;[4] (3) plaintiffs further complained that the instructions to the voters appearing at the bottom of the ballot in recent elections,[5] and presumably those same instructions would be employed in this election, were mislead-

3. Pursuant to 28 U. S. C. § 2284, the Governor and Attorney General of the Commonwealth of Pennsylvania were given adequate notice of the hearing and, in fact, were represented at the hearing.

4. The question whether all the political parties and bodies could be provided with separate vertical columns on the ballot resolved itself into one of physical possibility, for the City of Philadelphia only had voting machines which could accommodate up to nine columns. This did not present a problem in the Seventh Councilmanic District where only nine political parties or bodies had filed for ballot position. However, in the First Councilmanic District, 11 parties or bodies had filed for the election and, if all were unchallenged, it could occasion the type of ballot layout of which the plaintiffs complain.

5. These instructions, in pertinent part, appeared as follows on the face of the ballot:

INSTRUCTIONS TO VOTER

FIRST OPERATION—Turn Voting Switch to Right which will Close Curtain and will Unlock Machine so you can vote.

ing since they appeared to state that the voter would have to vote a straight party ticket before he could "split" his vote for candidates of other parties.

At the conclusion of the first hearing, it was readily apparent that this Court could not decide the issues presented because the facts were in an unsettled state. More specifically, the defendants advised the Court that the physical layout of the ballot would not be finally determined until the state courts ruled on challenges lodged against parties which had filed for ballot position in the First Councilmanic District for the November 4th election. The outcome of these challenges would be the controlling factor as to whether all the political parties would have their own vertical columns on the ballot so as to allow candidates for a particular office to appear on the same horizontal plane across the ballot. The defendants also agreed to have the plaintiffs participate in the drafting of new voter instructions with the intention that the new instructions would be acceptable to all. In light of these developments, the initial hearing was adjourned until such time as the final format of the ballot could be determined.

On October 6, 1969, another hearing was held. At this time, the defendants stated to the Court that of the 11 political parties and bodies that had filed for ballot position in the First Councilmanic District the state courts had sustained objections to three of the bodies and that the County Board of Elections had rejected the nominating papers of a fourth body. Consequently, only 7 political parties and

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5. (cont.)

SECOND OPERATION—TO VOTE A STRAIGHT PARTY TICKET.—Turn large lever at top of Party Column until X marks appear to the right of the names of all Candidates.

THIRD OPERATION—TO VOTE A SPLIT TICKET.—After turning down Party Lever, turn up Lever opposite the Candidate's name you wish to cut out. Then turn down Lever to the right of the name of any Candidate for the SAME OFFICE.

bodies remain on the ballot in the First Councilmanic District. The defendants also stated that the 9-column voting machines will be used in this District, thus providing each party and body with their own vertical column and party lever and allowing all candidates for a particular office to appear on the same horizontal plane on the face of the ballot. Similar arrangements are planned for the Seventh Councilmanic District where we have been told that not more than eight political parties and bodies will appear on the ballot. However, these procedures did not satisfy the plaintiffs who reiterated their objections to the presence of straight party levers, irrespective of the fact that these levers were now provided for all the political parties and bodies. The plaintiffs also complained that the "spatial gaps" which appeared on the ballot discriminated against their candidates. These "gaps" are the result of the failure of two parties (whose columns separate the two major parties on the left of the ballot from the independent bodies on the right of the ballot) to run candidates for the office of Councilman in the First District.

At the October 6th hearing, the defendants also presented to the Court the revised voting instructions[6] which

6. In pertinent part, these instructions will appear on the November 4, 1969 ballots as follows:

INSTRUCTIONS TO VOTER

1. Turn Voting Switch to Right Which Will Close Curtain and Will Unlock the Machine for Voting.
2. TO VOTE

a) You may vote a straight party ticket by pulling down and to the left, the large lever at the top of the Party Column until X marks appear to the right of the names of all Candidates of that party.

OR

b) You may vote a split ticket either by turning down the small individual levers to the right of each candidate for whom you wish to vote until an X mark appears to the right of the name of each candidate.

would appear on the ballots. These also were objected to by the plaintiffs who contended that it would be more logical to have the instruction for "splitting" a ticket come before the instruction which explains how to vote a straight party ticket.

Plaintiffs contend that notwithstanding the apparent equality of treatment on the face of the ballot, in that all parties and bodies now have their own vertical columns and party levers, the mere presence of party levers will cause voters who would otherwise vote for independent candidates to "shift" their votes to candidates of the major political parties. However, we find that the plaintiffs have failed to meet their burden of proof in this regard as no testimony was adduced to show that, where all parties and bodies had a straight party lever above their respective columns on the ballot, one desiring to vote for any of the independent candidates would in some way be deterred from so doing by the mere existence of a party lever appearing at the head of the Republican and Democratic columns.

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6. (cont.)

OR

You may turn down a party lever, then turn up the lever of candidate or candidates of that party for whom you do not wish to vote, and then turn down the lever of any other candidate FOR THE SAME OFFICE for whom you do wish to vote.

OR

c) To vote for a person whose name does not appear upon the ballot labels, release lever at the extreme left hand side of the machine, pull out slide of the office for which you wish to vote, and write name of person of your choice.

* * *

7. Neither of the plaintiffs' witnesses presented any evidence, statistical or otherwise, of such "a shift". Plaintiffs' witness Cooper was not familiar with any study comparing voting patterns in elections where party levers were used to those elections where they were not used (N. T. p. 54). He speculated that in his opinion the party levers would result in the regular party candidates getting more votes than they would get if party levers were not used, since many voters who might have difficulty with the voting machines, would take the

In the absence of such evidence, plaintiffs have urged the court to take judicial notice of several studies of voter habits which they contend support their theory that the use of a party lever causes a "voter shift".[8] This court has concluded that these studies are not properly before the court since they have not been identified by any witnesses as standard reference works and none of the experts who testified commented as to these specific studies either as to the authors' methodology or the accuracy of their results. In addition to this technical objection, however, a reading of the studies reveals that they simply do not support plaintiffs' claim. First, none of the studies were directed to the question of whether or not, in an election such as the one before the court, the mere presence of the party lever in and of itself would cause voters to shift their votes from independent candidates to the candidates of a major party. On this critical question, the studies are entirely silent. Secondly, the only tangible fact reported by these studies appears to be that, in the elections studied, candidates appearing below the top of the tickets tend to get more votes in states where party levers are used than they do in states where party levers are not used. The authors offer various hypotheses to explain this phenomenon, including voter confusion, voter fatigue, disinterest in the lower offices appearing on the ballot and a tendency to use the line of least resistance and vote for party affiliation when that can be

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7. (cont.)

line of least resistance and pull down the party lever of their own party (N. T. pp. 57-59). Cooper's testimony was entirely unsupported by reference to any persuasive data and is entitled to very little weight. In any event, it does not support the plaintiffs' theory of a "voter shift".

8. See Walker, *Ballot Forms and Voter Fatigue: An Analysis of Office Block and Party Column Ballots* in 10 Midwest Journal of Political Science 448 (1966); Campbell & Miller, *The Motivational Basis of Straight and Split Ticket Voting* in 51 American Political Science Review 293 (1957); Campbell, Converse, Miller & Stokes, *The American Voter* (1960).

done easily. None of the studies suggest that the well-informed, motivated voter would be in any way affected by the presence of the party levers. They also tend to indicate that the removal of the party lever would discriminate against poorly educated voters by depriving them of an opportunity to vote for the candidates of their political party in a convenient way.[9]

In the case at bar, a voter wishing to vote for an independent candidate for City Council has just as many ways of voting for that candidate as he has for voting for a candidate of one of the regular political parties. He can turn either the large party lever at the top of the column in which the candidate's name appears or he can use the smaller lever opposite the candidate's name. Hence it will not be substantially more difficult, as plaintiffs claim, to vote for an independent candidate for City Council than for a candidate of one of the regular political parties. Accordingly, this court has concluded that the plaintiffs have failed to sustain their burden of proving that the use of party levers in this election attains the dimension of an "invidious discrimination" proscribed by the Federal Constitution.

The Election Code of Pennsylvania makes it mandatory to have party levers on voting machines. It is set out at 25 Purdon's Pa. Stat. § 3007 that:

> "No voting machine shall . . . be approved by the Secretary of the Commonwealth . . . unless it shall, at the time, satisfy the following requirements:
>
> * * * * *
>
> (b) It shall permit each voter, at other than primary elections, to vote a straight political party ticket in one operation . . . to vote for all the candidates for one political party for every office to be voted for, except those offices as to which he votes for individual candidates.

9 See Walker, 450, 462.

(c) It shall permit each voter, at other than primary elections, to vote a ticket selected from the nominees of any and all political parties, from the nominees of any and all political bodies, and from persons not in nomination."

See *Leoni v. Philadelphia*, 90 D. & C. 2d 706 (1956); *Petition To Set Aside Special Election in the 32nd Senatorial District*, 15 D. & C. 2d 271 (1958).

The constitutionality of a single party lever was considered by a three judge court in the case of *Voorhees v. Bronson*, 231 F. Supp. 870 (D. Conn. 1964), aff'd 379 U. S. 618, 13 L. Ed. 2d 692. That case involved a Connecticut mandatory party lever statute where the machines were arranged so that it was necessary to pull a party lever to unlock the machine in order to vote. In holding that the statute did not deprive non-partisan voters of any constitutional right, the Court said:

"The mandatory party lever statute does not deny any candidate a place on the ballot, nor does it prevent any voter from voting for any candidate. A vote for a straight ticket is accorded no greater weight in the final tallies than a vote for a split ticket. While the wisdom of the mandatory party lever statute may be questionable, it can hardly be said to be fundamentally unfair or unreasonably discriminatory in contravention of the Fourteenth Amendment. Indeed, the disadvantaging inconvenience to the voter [under the Connecticut statute would appear to be much less than the New Jersey statute considered by a three judge court in Vellucci v. Gaynor, 232 F. Supp. 62 (D. C. N. J. 2d 1964)] in overcoming the obstacle to straight ticket voting is the opportunity to cast his vote for candidates on the ballot with the top group of candidates.

> "The utilization of party levers, be they optional or mandatory, discriminates against the independent voter to the extent the latter must spend more time and effort to vote for the same number of candidates than one who votes for a straight ticket. However, there is a rational basis for this discrimination, for the party lever simplifies and speeds up the voting process for large numbers of voters. . . . We are unable to see that the slight extra effort required for an independent voter to pull a party lever and reject candidates for whom he does not care to vote constitutes such a burdensome and unreasonable discrimination that the independent voter is deprived of the equal protection of the laws.

In the case at bar, there is even less disadvantage to the independent candidates than there was in the *Voorhees* case since any voter desiring to vote for such a candidate can do so by either turning the party lever at the head of the column in which the candidate's name appears or by pulling the lever which is next to his name.

Plaintiffs urge that the Supreme Court's affirmance of the *Voorhees* result should be ignored because it has been "undermined" by *Williams v. Rhodes*, 393 U. S. 23 and *Moore v. Ogilvie*, 394 U. S. 814, 818. We do not read those cases as undermining the result in *Voorhees*. In *Williams*, the court found that Ohio's election laws were so laced with restrictions as to make it virtually impossible for any party to qualify on the ballot except the Democratic and Republican parties. In *Moore*, the court voided an Illinois statute which made it impossible for the voters in 49 counties, representing 93.1% of the registered voters in the state, to form a new political party and place its candidates on the ballot. Both decisions rested on the principle that election laws which make it difficult or impossible for independent

parties or candidates to be placed on the ballot violate the Equal Protection Clause of the Federal Constitution because they have the effect of denying the franchise to many of the citizens of the states involved. There is no such problem here. All of the candidates who desire to be on the ballot are on the ballot, and there is no mechanical advantage given to any of the parties or candidates. Hence plaintiffs' reliance on *Williams* and *Moore* is misplaced.

Plaintiffs' second contention is that the "gap" between the Republican and Democratic columns on the left of the ballot (Columns A and B) and Columns E, F, and G on the right of the ballot (Mr. Gilhool appears in Column G) unconstitutionally discriminates against the candidates in Columns E, F, and G (see the Appendix). The basis for plaintiffs' contention is a theory known as the "law of proximity". There was expert testimony at the first hearing that the separation between the major party candidates, listed horizontally and in separate columns on the left of the ballot, and the independent candidates, listed vertically in one column on the right, on the visual field of the ballot, could deceive the voter into believing that the two groups were different and that the only candidates for the council manic election were the major party candidates on the left. This, it is said, will cause the independent candidates to lose votes, even if a voter originally intended to vote for an independent candidate when he entered the voting booth. The testimony of the expert was addressed to the original layout of the ballot, which, as we now know, will not be used in the November 4th election. Notwithstanding the changes in the set up of the ballot, however, plaintiffs urged at the second hearing that the "law of proximity" still applied, and that although the effect of the alleged prejudicial positioning of the columns arising from the operation of the "law of proximity" had been materially diminished by the new ballot layout, they had not been eliminated.

We find that the plaintiffs have also failed to sustain their burden of proof on this issue. Even if this "spatial gap" discriminates against independent candidates, there is no evidence as to the extent and magnitude of the alleged discrimination. The "gap" exists because the Constitutional Party in Column C and the American Independent Party in Column D have failed to run candidates for any office. Under the Pennsylvania Election Code, (25 Purdon's Statutes §2937), these two parties have a right to be on the ballot and voters may write in candidates in their columns. They are positioned between the party candidates and the independent candidates pursuant to the Pennsylvania Election Code and not at the whim of the Board of Elections. Under Section 201(f)(5) of the Election Code, the order of the parties from left to right on the ballot is dictated by the number of votes received by a party's candidate in the last gubernatorial election. The party whose candidate received the largest number of votes in that election is placed in Column A on the extreme left, the party receiving the next highest total is placed in Column B and so forth. If a party was not represented in that election, then it is listed alphabetically after those which were represented, beginning with the next available column to the left of the ballot and working towards the right. This statute reasonably and fairly arranges the parties on the ballot and cannot be considered unconstitutional merely because of the coincidence that two parties have not run any candidates.

Lastly, plaintiffs attack the voting instructions, claiming that they favor straight party voting to the prejudice of independent candidates. The original instructions have been changed and most, if not all, of the alleged bias has been overcome by the new instructions (See footnotes 5 and 6, *supra*). It has now been made clear to the voter that he need not first pull a party lever before "splitting" his vote among other candidates. Hence, the instructions neither

unjustifiably encourage voters to use straight party levers nor do they tend to confuse or dissuade voters from voting for independent candidates.

In view of our holding that plaintiffs' proofs with respect to the conduct of defendants in the scheduled Special Election to fill vacancies in the offices of Councilman in the First and Seventh Councilmanic Districts in the City of Philadelphia, Pennsylvania, have failed to establish that such conduct attains the dimension of "invidious discrimination" proscribed by the Federal Constitution, the Complaint is dismissed and an Order dismissing the Complaint will be entered.

What we have said above constitutes our Findings of Fact and Conclusions of Law.

ORDER.

AND NOW, to wit, this 14 day of October, 1963, it is ORDERED that plaintiffs' Complaint, in the above entitled matter, be and the same is hereby DISMISSED.

AND IT IS SO ORDERED.

HARRY E. KALODNER.
Harry E. Kalodner,
Circuit Judge.

A. LEON HIGGINBOTHAM.
A. Leon Higginbotham,
District Judge.

THOMAS A. MASTERSON.
Thomas A. Masterson,
District Judge.

APPENDIX

VOTING MACHINE SAMPLE BALLOT

GENERAL MUNICIPAL AND SPECIAL ELECTION, TUESDAY, NOVEMBER 4, 1969

28th WARD

Election District

	Republican Column A	Democratic Column B	Constitutional Column C	American Independent Column D	Consumers Column E	Peace Freedom Column F	Voters Action Column G	Column H	Question	Question
									YES	
									NO	
									YES	
									NO	
									YES	
									NO	
									Judicial Retention	Judicial Retention
									YES	
									NO

IN THE

Supreme Court of the United States

FEB 12 1970
JOHN F. DAVIS, CLERK

October Term, 1969 No. 1069

THOMAS K. GILHOOL, et al., *Appellants*,

v.

CHAIRMAN AND COMMISSIONERS, PHILADELPHIA COUNTY BOARD OF ELECTIONS, et al., *Appellees*.

MOTION TO DISMISS OR AFFIRM

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

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Philadelphia Democratic County Executive Committee

THE LEGAL INTELLIGENCER, 69 NORTH JUNIPER STREET, PHILA., PA. 19107

MOTION TO DISMISS OR AFFIRM

Appellee, Republican City Committee, moves the Court to dismiss the appeal herein on the grounds that the case is moot and that a three-judge Court should not have been convened, or, in the alternative, to affirm the judgment of the United States District Court for the Eastern District of Pennsylvania on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to warrant further argument. Appellee Democratic City Committee joins in this Motion.

QUESTIONS PRESENTED

Where the principal Appellant was an "independent" candidate for the office of Philadelphia City Councilman at a special election held on November 4, 1969, and his candidacy, which was unsuccessful, was placed upon the voting machine under the name "Urban Action Party" in a party column equipped with a straight party lever in the same manner as the major party candidates, and where the actual factual record of the case developed at a preliminary injunction hearing is barren of any competent probative evidence tending to show that the presence of a straight party lever discriminates against independent candidates in favor of major party candidates:

(1) Is the case moot?

(2) In view of the local nature of the election, should a three judge Court have been convened?

(3) In view of the absence of evidence of the effect of the party lever upon voting habits and of the numerous factors which demonstrably justify it as an appropriate subject of State policy, can Appellants successfully claim that the requirement that straight party levers be provided on all voting machines constitutes invidious discrimination?

against independent candidates and in favor of party candidates for the same office?

(4) Did the Lower Court act correctly in dismissing the Complaint rather than holding a full trial on the merits, even though one was never requested, and the relief sought in the Complaint was limited to the November 4, 1969 election?

STATEMENT OF THE CASE

Appellants are residents and electors of the First and Seventh Councilmanic Districts of the City of Philadelphia. Two of them, Gilhool in the First District and Hackett in the Seventh District, were candidates for the office of City Councilman at special elections held to fill vacancies in that office in conjunction with the regular Municipal Election on November 4, 1969. That election has been concluded and the successful candidates have been sworn into office and seated in the Council.[1] No challenge to the outcome of the two special elections was filed.

The gravamen of Appellants' Complaint is that the Pennsylvania Election Code, 25 Purdon's Pa. Stat. Ann. Sec. 3010 (h), providing for straight party voting, invidiously discriminates against Appellants as candidates (and voters) in favor of candidates running as part of a party ticket. Under the aegis of Section 3010 (h), straight party levers are required on voting machines at the top of each party column by means of which an elector may, in one operation, vote for all the candidates of that political party for every office to be voted for.

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1. The vote in the First District was: William B. Cottrell (Republican) 23,254; Natale F. Carabello (Democratic) 14,916; Thomas K. Gilhool (Urban Action) 5,183; Leonard W. Galloway (Consumer) 622; and Craig C. William (Black Panther) 277. Appellant Hackett did not even appear on the ballot because her nomination petition was stricken by the Court of Common Pleas as defective. She appealed that decision to the Pennsylvania Supreme Court, January Term, 1970, No. 170-71, but ultimately withdrew the appeal.

In their Complaint Appellants sought "declaratory" as well as preliminary and permanent injunctive relief, however, neither in the Complaint, nor anywhere during the course of the proceedings was reference to the Declaratory Judgment Act made. The Court below treated the case as one seeking purely injunctive relief.

The suit was brought on September 11, 1969, six days after the special election had been called. The original defendants, the Chairman and Commissioners of the Philadelphia City Commissioners (now Appellees) are the officials responsible for the setting up of the voting machines, and the conduct of the election. Pursuant to Appellants' request, a three-judge District Court was convened. The Philadelphia Republican City Committee and the Philadelphia County Democratic Executive Committee were then permitted to intervene as parties defendant. A hearing on Appellants' Application for a Preliminary Injunction was held on September 24, 1969. A continued hearing was held on October 6, 1969.

The first hearing produced some 142 pages of notes of testimony which have been certified as part of the record. The focal point of the hearing was a voting machine (N.T. 18) which was present in the courtroom and towards which the vast bulk of the testimony was referenced. Appellants produced two allegedly expert witnesses, Robert S. Cooper and Professor Julius Wishner,[2] to attempt to establish that the arrangement of the face of the voting machine in evidence discriminated against Appellants.

At the core of Appellants' case were certain detailed hypothetical questions which were asked these "experts" (see N.T. 56, N.T. 104-108). These questions were based upon: (1) the ballot arrangement on the face of the machine which was present in the courtroom, and (2) a voter

2. Neither witness was accepted as an expert by the Court below (See, inter alia, Appellants Appendix A-p. 27, footnote 7). The Court, for instance, permitted Cooper's testimony for "whatever limited value it might have" (N.T. 55).

instruction sheet which had been utilized in previous elections. The most significant factor to be considered by this Court in reviewing the record in this case is that the arrangement on the voting machine upon which the hypothetical questions were based *was not* the arrangement on the face of the machines actually used in the election. The final arrangement, which is shown in Appellants' Appendix A, p. 36, was radically different. Because the sample ballot shown in Appellants' Appendix is a rough diagram of the final ballot, Appellees have added as Appendix A to this brief a copy of the ballot as it appeared in the voting machines on November 4, 1969. Moreover, the voting instructions comprehended in the hypothetical questions were also radically changed and totally different ones were used in the actual election (see Appellants' Appendix A, pp. 26-27).

On the ballot arrangement which actually appeared on the voting machine in the election, Appellant Gilhool, who filed under the political body name "Urban Action Party," was given a straight party lever in Column G[3] (see

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3. Under the initial ballot arrangement contemplated at the time of the preliminary injunction hearing, Gilhool was arrayed vertically in a column on the right hand side of the machine along with the other "independent" candidates for the councilmanic vacancy. This occurred because at that time there were more "independent" candidates for the First District Councilmanic seat than could be arrayed in separate columns on the Shoup voting machines in use in that district. In that situation the Election Code, 25 Purdon's Stat. Ann. §3010 (h) provides:

> "The names of all candidates of a political body shall appear in the same row or column, and, if the number of parties and bodies permits, each political body shall be entitled exclusively to a separate row or column, with a straight party lever. If, however, the number of political parties and political bodies renders it impossible or impracticable to so arrange the political bodies, in such case said bodies shall not be entitled to a separate row or column and a straight party lever, but shall be listed by political appellations on the

Appellants' Appendix A, p. 36 and Appellees' Appendix A). Therefore, it was possible for a voter to vote for Appellant Gilhool by pulling the straight Urban Action lever in the same manner that a voter could have voted for a Republican or Democratic candidate for the office. The record is undisputed that one could have voted for Appellant Gilhool on November 4, 1969 in the same number of ways and in the same manner as one could have voted for the Republican or Democratic candidates (see Opinion of the Court below, Appellants' Appendix A, p. 29).[4]

With one exception, Appellants' own witnesses conceded (see e.g. N.T. 90-94) that Gilhool was treated in the same manner on the voting machine as the Republican and Democratic candidates were. The exception turns on the fact that there was a "gap" between the major party columns and the Urban Action column. This was the result of the failure of the Constitutional and American Independent Parties, the two parties whose columns separate the two major parties on the left of the ballot from the

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first left hand or top row with the designating letter and number of the ballot label where their candidates may be found, together with the political appellations of other political bodies, whose candidates may be interspersed on the same row or column."

However, a number of the candidates were stricken from the ballot by Common Pleas Court because their nomination papers were found to be defective. There then was sufficient room on the machine, and Gilhool was given a separate column and party lever. It should be noted that even had the initial ballot arrangement prevailed, Appellees would have maintained and could have clearly demonstrated that the "independent" candidates were not discriminated against. They would have been fully protected by options available on the Shoup voting machines, but it is unnecessary to discuss that point in view of the striking of the excess candidates from the ballot.

4. This is confirmed by a review of the revised voting instructions (see Appellants' Appendix A, p. 36) which explains the mechanics of voting machine voting in Pennsylvania.

independent political bodies[5] on the right of the ballot, to run candidates for the office of Councilman in the First District.

The second hearing produced nothing but: (1) the submission of the final ballot arrangement and the revised voter instructions as to operation of the machines discussed above; and (2) an attempt to introduce into evidence certain studies of voter habits which were intended to support Appellants' theory that the use of a party lever causes a voter shift. While Appellants had objected to the first set of voter instructions as being disciminatory, no objection was lodged against the final set of instructions.

In its Opinion, which followed on October 14, 1969, the Court found that Appellants had failed to meet their burden of proving that the mere presence of party levers would cause voters who would otherwise vote for independent candidates to shift their votes to candidates of the major political parties. The Court ruled that the studies of voter habits were inadmissible.

In its opinion, the Court also rejected the argument that "the spatial gap" discriminated against independent candidates on the ground that there was no evidence as to the extent and magnitude of the alleged discrimination. Mindful of the fact that not every party can be first on the ballot in any situation, the Court held that the statute reasonably and fairly arranged parties on the ballot and could

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5. Under the Pennsylvania Election Code a distinction is made between Political Parties and Political Bodies. 25 Purdon's Penna. Stat. Ann. Sec. 2831. A Statewide Political Party is one whose candidate(s) polled at least 2% of the Statewide vote (and also 2% of the vote in any 10 counties) for any given office in the preceding general election. A Countywide Political Party is one whose candidate(s) has polled 5% of the Countywide vote for any office in the preceding general election. A Political *Body*, such as the Urban Action Party formed by Appellant Gilhool, can acquire a position on the ballot merely by obtaining signatures of one-half of one percent statewide, and two percent countywide of the largest entire vote cast for any elected candidate at the previous election in the applicable electoral district. 25 Purdon's Pa. Stat. Ann. Sec. 2911.

not be considered unconstitutional merely because of the coincidence that two parties did not run any candidates. (See Appellants' Appendix A, p. 33).

Having concluded that Appellants had failed to sustain their burden of proving that the use of party levers in the election in question attained the dimension of invidious discrimination proscribed by the Federal Constitution, and therefore that Appellants were not entitled to preliminary injunctive relief directed towards the November 4, 1969 Election, the Court proceeded to dismiss the Appellants' claim for permanent injunctive relief. In this regard it should be noted that: (1) by that time the election was imminent; (2) no request had ever been made by Appellants to have the testimony on the record treated as on final hearing or to advance the trial on the merits and consolidate it with the hearing on the application for preliminary injunction, and (3) Appellants' Complaint was directed only to the November 4, 1969 Election. The request for a full trial on the merits as they are now advanced, i.e. on the constitutionality of Pennsylvania straight party lever voting as an abstract question (as opposed to the constitutionality of the ballot arrangement for the November 4, 1969 Election), came for the first time in Appellants' Jurisdictional Statement accompanying this Appeal.

ARGUMENT

I. THE CASE IS MOOT.

Anticipating that Appellees would argue that the case is moot, Appellants contended in their Jurisdictional Statement that this case is on all fours with *Moore v. Ogilvie*, 394 U.S. 814, (1969), because the challenged practice under State law was "capable of repetition, yet evading review." Appellants argued further that all independent candidates and their supporters will continue to be affected

at every future election so long as the Pennsylvania Election Code continues to require straight party levers. In this analysis, however, Appellants have themselves evaded reviewing the following salient factors in the case, which bear on the question of mootness:

1. It is impossible to measure the effect of the straight party lever in the abstract, i.e. without reference to a particular ballot arrangement. We have no idea of what the ballot arrangement in future Presidential, Gubernatorial, Mayoralty, Congressional Elections, etc., will be. It is submitted that a ballot arrangement problem similar to the one involved in the present case is unlikely to arise again.[6]

2. The within Complaint focuses solely upon the November 1969 Election and makes no request for continuing relief. It does not allege that Appellants Gilhool or Hackett will ever again be candidates or that Appellants who are denominated simply as voters will ever again choose to vote for them or for any independent candidate similarly situated. Neither is there any evidentiary proof in the record as to any of these items. *Golden v. Zwickler*, 394 U.S. 103 (1969), holds that where there is no substantial continuing controversy between parties having adverse legal interests, the case is moot. See also *Brockington v. Rhodes*, 396 U.S. 41 (1969). *Hall v. Beals*, 396 U.S. 45 (1969), emphasized the futility of the Court's deciding cases where its mandate can have no practical or realistic effect upon the rights asserted by the particular parties in the suit. Since the instant Complaint alleges no injury to any of the Appellants that continued beyond November 4, 1969, the case is like *Hall v. Beals*, supra, which held that Appellants cannot represent a class of which they are not members.

6. There is no certainty that in the foreseeable future the voting machines will not be able to accommodate all independent political bodies with a separate straight party lever, as in the instant case. Likelihood that a situation will recur was held to be important in *Golden v. Zwickler*, 394 U. S. 103 (1969).

3. The within action does not seek declaratory relief and is distinguishable from *Moore v. Ogilvie*, supra, on this additional ground. Even declaratory relief is not available for it is unlikely that an actual controversy between the parties would ever arise again. *Golden v. Zwickler*, supra.

When these factors are considered, the mootness argument must, it is submitted, be sustained.

II. A THREE-JUDGE COURT SHOULD NOT HAVE BEEN CONVENED BECAUSE THE FILLING OF VACANCIES UNDER A LOCAL HOME RULE CHARTER IS NOT A STATEWIDE ISSUE.

The question of filling vacancies in councilmanic offices is covered by section 2-101 of the Philadelphia Home Rule Charter. That section provides for the calling of a special election to fill the vacancies for the balance of the unexpired term. The City could have provided in its Charter for the filling of vacancies by a variety of means, including a special election, but the fact that the City Home Rule Charter in effect incorporates by reference the provisions of statewide legislation (the Pennsylvania Election Code) does not mean that the conduct of that election is a statewide issue. The relief and the determination sought by the complaint is only with respect to the two councilmanic elections.

It is basic that a three-judge Court should not be convened except where the issue involved is truly statewide in its scope. As was stated in *Moody v. Flowers*, 387 U. S. 97 (1967):

> "The officer sought to be enjoined must be a state officer; a three-judge court need not be convened where the action seeks to enjoin a local officer (Ex parte Collins, supra; Rorick v. Board of Commissioners, supra) unless he is functioning pursuant to a statewide policy and performing a state function.

> Spielman Motor Sales Co. v. Dodge, 295 U.S. 89, 55 S. Ct. 678, 79 L.Ed. 1322. Nor does the section come into operation where an action is brought against state officers performing matters of purely local concern. Rorick v. Board of Commissioners, supra."

A comparison of *Moody v. Flowers*, *supra*, and *Dusch v. Davis*, 387 U.S. 112 (1967), where three-judge Courts were held to have been improperly convened, with *Sailors v. Kent Board of Education*, 387 U.S. 105 (1967), where the three-judge Court was held to have been proper, indicates that the Court below should have denied relief ab initio.

This issue was raised below by intervenor Democratic County Executive Committee in its Memorandum of Law Contra Motion for Preliminary Injunction. In any event, the propriety of convening a three-judge Court and, therefore, the validity of the jurisdiction of this Court, can be raised in this Court even if never raised below. *U.S. v. Griffin*, 303 U.S. 226 (1937). The question may even be raised by the Court on its own motion. *Stratton v. St. Louis Southwestern R. Co.*, 282 U.S. 101 (1930).

III. THE QUESTIONS ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

As we have seen in the Statement of the Case, Appellant Gilhool was afforded the benefit of a straight party lever, to the same extent as the Republican and Democratic candidates. But he nonetheless persists in arguing a case which is different from that in the record. The case which he argues is that, in the abstract, the straight party lever discriminates against independent candidates who have no straight party lever. And he argues it, not on the basis of evidence before the Court, but on the basis of

political science treatises and articles not before the Court.[7]

Appellees submit that the Court below was correct in concluding that these studies were not properly before it as they were not identified by any witnesses as standard reference works, and none of the court "experts" who testified[8] commented as to the specific studies either as to the authors' methodology or the accuracy of their results. The Court below was also correct in concluding that the studies do not support Appellants' claim. (See Appellants' Appendix A, p. 28).

Appellees find the analysis of the Court below as to the value of these studies to be persuasive. In addition to the factors mentioned in the Court's opinion, the following matters relating to data and methodology support the Court's decision to exclude the studies:

1. The studies are not directed towards the question at issue in this case.

2. The studies do not report data from Pennsylvania whose Election Code is under attack herein, or from states whose voting machines are demonstrated to be arranged like those in Pennsylvania.

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7. Walker, "Ballot Forms and Voter Fatigue: An Analysis of Office Block and Party Column Ballots", 10 *Midwest Journal of Political Science* 448 (1966), Campbell & Miller, "The Motivational Basis of Straight and Split Ticket Voting", 51 *American Political Science Review* 292 (1957), Campbell, Converse, Miller & Stokes, *The American Voter* (1960), and Key, *Politics, Parties and Pressure Groups* (5th ed. 1964).

8. As has been set forth in the Statement of the Case, the "expert testimony" adduced at the first hearing did not refer to the ballot arrangement actually used in the election. Moreover, it was possible to vote for Appellant Gilhool in as many ways and in the same way as one could have voted for the major party candidates. It would be repetitive to reanalyze those aspects of the matter here. However, the fact that Appellant failed to establish discrimination by any *direct testimony* adds to the force of Appellees' argument.

3. *Campbell and Miller*, the principal study dealing with voter motivation, give so many rationales for the voting of straight and split tickets that it is impossible to draw any firm conclusion from its data. Moreover, virtually all of the data in the studies cited by Appellants comes from Presidential elections (principally the 1956 Eisenhower-Stevenson Presidential Election) where the issues are very different from those involved in the local election now before the Court.

Turning, however, from methodology to substance, Appellants, both in the text of their jurisdictional statement and in the text of the studies upon which they reply, set forth important justification for the utilization of the straight party lever. This becomes important to the case because it is basic to this area of the law that if there is reasonable justification for the State's action, it will be sustained under the Equal Protection Clause. The applicable law will be discussed at length below. However, Appellees will take the opportunity, at this point in the brief, to discuss the substantive question of whether the straight party lever is justifiable in fact, commenting first upon the reasons given by Appellants and the studies which they cite, followed by Appellees' additional analysis.

First of all, the Walker study concludes that the so-called office block ballot, which is the principal way of arranging the ballot when the party lever is removed, increases voter fatigue and vote "roll-off". This means that when poorly educated, badly informed voters are encouraged to split their tickets, the greater is their tendency to neglect contests at the bottom of the ticket. This would include contests such as the one in question for City Council. Such "roll-off" clearly dilutes these voters' electoral weight.

Secondly, *Campbell and Miller* explain that there are huge masses of voters whom they variously describe as "highly politically motivated voters" or "party oriented voters" who intellectually and philosophically prefer the

straight party lever because it gives the fullest effect to their political will and recognizes the historical importance of political parties.

Conversely, it may clearly be inferred from the Campbell and Miller study that it is easier for voters using the office ballot arrangement (which is generally the reverse of the party column arrangement) to vote on a purely ethnic or on a frivolous basis. It is plain that voters often do so, and the party lever is valuable in discouraging it.

Appellants have given important justification for the party lever even in their own Complaint (see paragraph 18), and in their Jurisdictional Statement in this Court (see page 17). In these documents, Appellants point out that in many elections there is a strong and perhaps compelling state interest on the side of favoring party candidates for lower offices in the manner allegedly achieved by party levers in Pennsylvania. That situation, they contend, is where the election involved the choice of the full "team" of elected officials to govern a political unit such as a governor and members of the legislature, mayor and city council, etc. Appellants are correct as to this very important point, although they have failed to grasp its applicability to the present case where three important municipal offices were on the ballot—District Attorney, City Controller and Councilmen, who indeed formed a "team." The concept is, of course, present in even greater measure in the November elections of the other three years of a four-year cycle where, in Philadelphia at least, the voters are called upon to vote for a governor and General Assembly (1970), for a Mayor, "row offices" and City Council (1971), and for President and Congress (1972).

Appellees agree that the straight party lever does indeed permit a voter to give expression to his particular political philosophy by supporting the full slate of the party of his choice. Appellees submit that in some measure this adds to the stability of the American political system. It does not limit that system to two parties because it is

easy, in Pennsylvania at least, for other parties to get on the ballot and obtain their own straight party lever (as the Urban Action party did). By permitting a voter to express his political philosophy and vote for a team by pulling the straight party lever, the state fosters a legitimate interest. Appellees submit that if Appellants are suggesting that the equal protection clause must be infused with the policy that it is more desirable to emphasize the role of individual candidates than the role of the party, hence invalidating the party lever, then Appellants are seeking to lead this Court into the realm of a political judgment which indeed would be non-justiciable notwithstanding the line of cases following *Baker v. Carr*, 309 U.S. 186 (1962).

There is another equally important role of the party lever—it provides an effective mechanical means of speeding up the voting process. This is a tremendously important factor in congested urban areas where the bulk of the voters come to the polls after work, and where the polls close at 8:00 p.m. Were it not for the use of voting machines containing party levers which speeds up the voting process, such long lines would accumulate at polling places in the cities that numerous voters would be discouraged from exercising their franchise at all because of the delay.

Having argued at length there is a legitimate state interest in providing a straight party lever—for all parties and political bodies—as part of its election machinery, Appellees hasten to add the obvious: that it is not its burden to do so, but rather Appellants' burden to prove invidious discrimination. But as has been pointed out above, the record in this case and in Appellants' studies is totally inconclusive as to the effect of the straight party lever on the voter. It is submitted that that effect depends upon a myriad of variables. These include the nature of the election, the issues involved, the identity of the candidates, and the education, experience, and philosophy of the voter. To state a tautology, these variables are and never will be,

constant. The fact is that the total milieu varies from election to election, and Appellees wonder indeed whether all of the in-depth psychological studies in the world could ever establish Appellants' point.

Hence the record up until now does not demonstrate that the state has injected a bias into the election procedure. The vastly increased incidence of split ticket voting (and the data from the Eisenhower-Stevenson Election of 1956 cited by Campbell and Miller is a case in point) inveighs against Appellants' argument that the party lever inhibits independent voting. If there is an incidental benefit to a political party or to the fulfillment of the rights of the elector to make a choice by party based on party principle rather than on individuals whom he may or may not know, this is nothing more than a recognition of the importance of political parties in our American way of life and does not constitute any capricious or invidious debasement of the right to vote.

For the Court to declare straight party lever voting unconstitutional would have enormous and far-reaching consequences. Appellees have surveyed the voting laws of the fifty states of the Union and have determined that there are at least twenty-seven states which permit straight ticket voting.[9] Accordingly, it is submitted that this Court should not lightly embark upon that course, especially in light of the meager record in this case.

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9. According to Appellees' research, (and see Congressional Quarterly, July 1963) the states which permit straight ticket voting are Alabama, Arizona, Arkansas, Connecticut, Delaware, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Michigan, Missouri, New Hampshire, New Mexico, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Vermont, West Virginia and Wisconsin. Citations of the applicable election laws of the states are contained in Appendix B to this Brief. Of course, not all of the states use voting machines, and in the states where they are used they are not used in all areas (See Appendix C to this brief). But it is possible to vote a straight party lever on a paper ballot by marking the appropriate box with an X, and so a determination in this case might affect paper ballot voting as well.

The issue involved is not new to this Court. It was dealt with in the case of *Voorhes v. Dempsey*, 231 F. Supp. 975 (D. Conn. 1964), Aff'd 379 U.S. 648. That case involved a Connecticut mandatory party lever where the machines were so arranged that it was necessary to pull a party lever to unlock the machine in order to vote. In Pennsylvania one can activate the machine and then split the ticket without pulling the straight party lever. Hence, if the party lever were upheld in *Voorhes* it must, a fortiori, be upheld here. In *Voorhes*, the three-judge Court held that the Connecticut Statute did not deprive independent voters of any constitutional right, and this Court affirmed that decision. The three-judge Court stated:

> "Under the Federal Constitution the states have been entrusted with broad discretion in formulating an election system, *United States v. Classic*, 313 U.S. 299, 311 (1941), and nothing in the complaint indicates that this discretion has been abused. The mandatory party lever statute does not deny any candidate a place on the ballot, nor does it prevent any voter from voting for any candidate. A vote for a straight ticket is accorded no greater weight in the final tallies than a vote for a split ticket. While the wisdom of the mandatory party lever statute may be questionable, it can hardly be termed fundamentally unfair or unreasonably discriminatory in contravention of the Fourteenth Amendment. Indeed, the disadvantaging inconvenience to split ticket voters for the Connecticut statute would appear to be much less than the New Jersey statutes, sustained by a three judge court in *Voltaggio v. Caputo*, 210 F. Supp. 377 (D.C.N.J. 1962), denying an independent candidate the opportunity to have his name listed on the ballot with the top group of candidates. . . .

"The utilization of party levers, be they optional or mandatory, discriminates against the independent voter to the extent the latter must spend more time and effort to vote for the same number of candidates than one who votes for a straight ticket. However, there is a rational basis for this discrimination, for the party lever simplifies and speeds up the voting process for large numbers of votors . . . We are unable to see that the slight extra effort required for an independent voter to pull a party lever and reject candidates for whom he does not care to vote constitutes such a burdensome and unreasonable discrimination that the independent voter is deprived of the equal protection of the laws." 231 F. Supp. at 975.

Appellees have reviewed the Jurisdictional Statement filed with this Court in the Voorhes case. In that statement, Voorhes averred that the following questions were presented (inter alia) by the Appeal: . . .

C. "Whether the mandatory party lever established by the Connecticut General Statutes denies the plaintiffs their right to free selection by placing upon them mental and psychological pressure to merely and solely pull a party lever

D. "Whether the mandatory party lever established by Sec. 9-242 of the Connecticut General Statutes subjects independent voters of said state to a more burdensome condition in casting their votes than the conditions to vote required of voters registered in a party.

E. "Whether the mandatory party lever established by the Connecticut General Statutes denies independent voters of said state equal protection of the law

F. "Whether the mandatory party lever is class legislation establishing a preferential group accorded privileges and immunities not granted to other voters."

It is submitted that a mere recitation of the foregoing establishes that the same issues as are involved herein were involved in *Voorhes*.

The principal thrust of Appellants' contention in this case is that this Court's affirmance of *Voorhes* should be ignored because it has been "undermined" by *Williams v. Rhodes*, 393 U.S. 23 (1968), and *Moore v. Ogilvie*, supra. Appellees cannot agree with this contention, and neither did the Court below. As Judge Masterson pointed out, *Moore* voided an Illinois statute which made it impossible for the voters in forty-nine counties, representing 93.4 percent of the registered voters in the state, to form a new political party and place its candidates on the ballot. In *Williams* the Court found that Ohio's election laws were so laced with restrictions as to make it virtually impossible for any party other than the Republican and Democratic parties to qualify on the ballot. The facts of the case at bar are far, far different. Appellants had no difficulty in obtaining a place on the ballot under Pennsylvania law[10] and were afforded a straight party lever just as were the major parties. Moreover, it is even questionable as to whether *Williams* is an equal protection case in light of the concurring opinions of Justices Harlan and Douglas, and the dissenting opinions of Justices Stewart and White and Chief Justice Warren. *Moore* and *Williams* are so different on their facts that they cannot be construed to have "undermined" *Voorhes*.

Williams v. Rhodes does confirm the principle that a state may enact laws which reasonably regulate the electoral process. In two cases filed since, the Court has upheld state election laws which require independent candidates to obtain more signatures than party candidates in order to get on the ballot. *Lyons v. Daveren*, 402 F. 2d 890 (C.A. 1, 1969), cert den. 393 U.S. 108 (1969) and *Moskowitz v. Power*, (New York Court of Appeals, 1969) U.S. Supreme Court Oct. term 1969 No. 770 (Appeal Dismissed Jan. 20, 1970).

10. See footnote 4 to this Brief.

There have been many state cases sustaining the validity of straight party voting. The earliest is *Todd v. Board of Election Commissioners*, 104 Mich. 474, (1895), but Pennsylvania, whose law is under attack herein, soon followed with *Oughton v. Black*, 212 Pa. 1, 61 A. 346, (1905). There the Supreme Court of Pennsylvania had before it the constitutionality of straight party voting under the state statute. In that case independent candidates for office contended that giving to voters who wished to vote for all candidates of one political party the special privilege of doing so by a single cross-mark constituted an inequity and authorized a method of voting for political parties, not for men; and that such special privilege given to straight-ticket voters and denied to others, injured the plaintiffs, who, as candidates, were opposed by candidates who could be much more easily voted for.

That Court stated (212 Pa. at 6):

> "The free and equal exercise of the elective franchise by every elector is not impaired by the statute, but simply regulated. A regulation for the convenience of certain electors providing that they may,—not must,—if they desire to vote a straight party ticket, vote for it by marking a cross in the square opposite the name of the party of the their choice is not inequality as against these complainants. They have the right to vote in precisely the same way for all of the candidates on the Municipal League ticket."

More recent expressions of a similar view by the Pennsylvania Courts appear in *Davidowitz v. Philadelphia Co.*, 324 Pa. 17, 187 A. 583 (1936); and *Petition to Set Aside Special Election*, 15 D. & C. 2d 271 (1956).

To the same effect are *Morrison v. Lamarre*, 75 R.I. 176, 65 A. 2d 217 (1949); *Brock v. Helton*, 395 S.W. 2d 765 (Ct. of App. of Kentucky, 1965); *State v. Martin*, 24 Mont. 403, 62 Pac. 588 (1900); *State v. Wait*, 92 Neb. 313, 138 N.W. 159 (1912); *State v. Neffner*, 137 Ohio St. 309, 29 N.E. 2d 215 (1940); *State v. Grasso*, 27 Conn. Sup. 67, 229 A. 2d 703 (1966); Also see *Voltaggio v. Caputo*,

210 F. Supp. 377 (D. C. N.J.), app. den. 371 U.S. 232 (1963), and *Melchior v. Todman*, 296 F. Supp. 900 (D. C., Virgin Islands, D. St. Thomas and St. John, 1968), where Chief Circuit Judge Hastie assumed the validity of straight party voting.

The identical principle is involved whether the election is a regular election or a special election. In each case the election is for the purpose of filling an office. *Leon v. Philadelphia*, 9 D. & C. 2d 706 (1956); *Petition to Set Aside Special Election*, 15 D. & C. 2d 271 (1956).

The basic standard of constitutional adjudication under the Equal Protection Clause—a standard under which only "invidious discrimination" is forbidden—is best summarized in two cases: *Skinner v. Oklahoma*, 316 U.S. 535, (1959), and *McGowan v. Maryland*, 366 U.S. 420, (1960).

The *Skinner* Court said:

> "Under our constitutional system the States in determining the reach and scope of particular legislation need not provide 'abstract symmetry.' Patsone v. Pennsylvania, 232 U. S. 138, 144, 58 L.Ed. 539, 543, 34 S. Ct. 281. They may mark and set apart the classes and types of problems according to the needs and as dictated or suggested by experience." (316 U.S. at 539-40)

The *McGowan* Court stated:

> "The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." (366 U.S. at 425-26)

When we measure the contentions raised by Appellants against the standard set forth in *Skinner and McGowan*, it is apparent that they are so insubstantial that the case must fall. To recapitulate what we have said:

1. The record below reveals that there was no discrimination against Appellants on the instant facts, since all parties had an equivalent straight party lever.

2. There is no competent evidence in the record as to what effect, if any, the straight party lever has upon the psychology and conduct of voters in the voting machine. Even if this Court were to conclude, a priori, that the party lever has some effect and that it favors the major party candidates, there is no evidence as to how great that effect is or that it is substantial.

3. There are numerous factors justifying the straight party lever voting arrangement which are well within the scope of a State's discretion, such as expediting the voting process, facilitating the expression by a voter of his party preference, discouraging vote "roll-off," etc. These are described in detail above.

4. Even if the Court were to conclude that there is some slight advantage to the party candidates, there is clearly no "invidious discrimination."

In view of the foregoing, it is submitted that the conclusion of the Court below that Appellants had failed to sustain their burden of proving that the straight party lever causes "invidious discrimination" must be affirmed.

IV. THE COURT BELOW ACTED PROPERLY IN DISMISSING THE COMPLAINT.

Appellants' Complaint did not request any of the following: (1) injunctive relief beyond the November 4, 1969 Election; (2) relief under the Declaratory Judgment Act; (3) consideration of the record at the preliminary injunc-

tion hearing as on final hearing; (4) advancement of trial on the merits, and/or consolidation of it with the preliminary injunction hearing. Appellants could easily have requested (3) or (4) under Federal Rule 65 (a) (2) in the lower Court. It was not the Court's obligation to do it for them and it is too late for them to rely on Rule 65 (a) (2) on Appeal.

On the other hand, there was filed on behalf of Appellee City Commissioners, a Motion to Dismiss under Rule 12 of the Federal Rules of Civil Procedure. Although it did not expressly say so in its Opinion, it is submitted that the Court below, in dismissing the Complaint, can be construed to have acted on that Motion to Dismiss; or in light of the testimony, the Court might be construed to have treated the Motion as one for Summary Judgment under Federal Rule 56, granted it and dismissed on that ground.

In any event, in view of the failure of Appellants to request the four items just enumerated; in view of the testimony; and in view of the legal arguments set forth in the preceding section of the brief, it is submitted that the Court acted properly in dismissing Appellants' Complaint. To have proceeded with a trial after the Election, when the case was moot, even had there been a request to do so, could not have resulted in a different outcome.

CONCLUSION

Wherefore, Appellees respectfully submit that the case is moot; that a three-judge Court should never have been convened; and that the questions upon which this cause depend are so unsubstantial as not to need further argument. Appellees therefore respectfully move the Court to dismiss this Appeal or, in the alternative, to affirm the judgment entered in the cause by the United States District Court for the Eastern District of Pennsylvania.

Respectfully submitted,

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APPENDIX B
Summary of State Voting Laws*

State	Source	Straight Party Voting Permitted or Required	Straight Party Voting Not Permitted
Alabama	Code, Title 17 §§97, 159, 161, 193	X	
Alaska	Stats. (Michie), §§15.15.030, 360(1), 15.20.260		X
Arizona	Rev. Stats. Anno., §§16-793A, 8-441I	X	
Arkansas	Stats. Anno., §§3-832, 3-837, 3-1234, 3-4702	X	
California	West's Elec. Code, §§10228, 14412, 15014, 15028, 15711	X**	
Colorado	Rev. Stats., §§49-11-9, 49-15-10		X
Connecticut	Const., Art. VI, Sec. 5, Gen. Stats. Anno., §9-242	X	
Delaware	Code, Anno., Title 15, §§4940, 5002(3), 5008	X	
Florida	Stats. Anno., §§101.011, 101.191, 101.36		X
Georgia	Code, Anno., Title 34, §§1206, 1208, 1314(c), 1322(b), 1330(c)	X	
Hawaii	1968 Rev. Stats., §§11-55, 15-32		X
Idaho	Code, Vol. 6A, Title 34, §§904, 1011, 2401		X
Illinois	Smith-Hurd Anno. Stats., Ch. 46, §§17-11, 24-1, 24A-4, 24A-16(2), 24A-16(6)	X	
Indiana	Burns' Stats. Anno., §§29-5001, 29-5021, 29-5114, 29-5218(5)	X	
Iowa	Code Anno., §§49.42, 49.94, 49.97, 52.10	X	
Kansas	Stats. Anno., §§25-416, 25-602, 25-603a		X
Kentucky	Baldwin's Rev. Stats., §§118.280, 125.040(3), 125.060	X	
Louisiana	Rev. Stats., Title 18, §§671A(Supp.), 1168(3)	X	
Maine	Rev. Stats. Anno., Title 21, §§922, 1038	X	
Maryland	Code Anno., Art. 33, §§16-3, 16-5, 107(b)		X
Massachusetts	Gen. Laws Anno., ch. 54, §§33, 42, 77		X
Michigan	Compiled Laws Anno., §§6.1706 (Supp.), 6.1737(2), 168.775, 168.706	X	
Minnesota	Stats. Anno., §§203.30, 204(10)(a), 206.07(4), 206.07, 206.07(1), 206.185		

Missouri	Anno. Stats., §§111.580(1), 121.060 (3), 121.100	X	
Montana	Rev. Code, §§23-1210, 23-1603A		X
Nebraska	Election Laws, §§32-422, 32-451, 32-452, 32-4113		X
Nevada	Election Laws, §§293.293(1), 293.295, 293.473		X
New Hampshire	Election Laws, §§52.26, 59.27, 59.58	X	
New Jersey	Stats. Anno., Vol. 19, §§19:15-27, 19:48-1		X
New Mexico	Stats. Anno., §§3-3-13(D), 3-3-12(4), 3-4-2(H), 3-9-5(H)	X	
New York	McKinney's Election Laws (Vol. 17), §105, 241, 248		X
North Carolina	Gen. Stats., §175(1)(c)	X	
North Dakota	Century Code, §§16-12-05, 16-21-02		X
Ohio	Page's Code Anno., Title 35, §§3505.03, 3507.05, 3507.07		X
Oklahoma	Stats. Anno., Title 26, §§274, 371	X	
Oregon	Election Laws, §§250.110(6), 258(1)(h) & (j), 258(2)(b)		X
Pennsylvania	Purdon's Stats. Anno., Title 25, §§ 3007(b), 3055(c), 3063(b)	X	
Rhode Island	Gen. Laws, Title 17, §§19-3, 19-15	X	
South Carolina	Code, §§23-310, 23-404	X	
South Dakota	Election Laws, §§16.1105, 16.1203, 16.2204	X	
Tennessee	Election Laws, §§2-1220, 2-1502, 2-1507		X
Texas	Election Laws, §§6.05, 6.06, 7.14(2), (8)	X	
Utah	Election Laws, §§20-7-20, 20-7-21, 20-18-4	X	
Vermont	Election Laws, Title 17, §§1043, 1086	X	
Virginia	Code, §§24-245, 24-295, 24-318.3, 24-318.4		X
Washington	Rev. Code, Anno., §§29.30.080, 29.33.090		X
West Virginia	Code (Michie), §§3-4-8(2)(8), 3-6-5(2)	X	
Wisconsin	Stats. Anno., §§5.37(1), 6.22(b), 11.03(2)	X	
Wyoming	Stats., §§22-118.81, 22-118.84, 22-118.113, 22-118.145		X

It should be noted that there are numerous differences among the statutory provisions above cited which cannot be reflected in a short summary such as is here presented. The purpose of this appendix is to describe, in compendious form, the general shape of [illegible]

APPENDIX C

Use of Voting Machines*

State	Statewide use required	Used in majority of voting areas	Used in some voting areas	State	Statewide use required	Used in majority of voting areas	Used in some voting areas
Alabama		★		Montana			★
Alaska			★	Nevada			★
Arizona		★		New Hampshire			★
Arkansas			★	New Jersey		★	
California			★	New Mexico	★		
Colorado		★		New York	★		
Connecticut	★			North Carolina			★
Delaware	★			North Dakota			★
Florida		★		Ohio			★
Georgia			★	Oklahoma			★
Hawaii			★	Oregon			★
Illinois		★		Pennsylvania		★	
Indiana		★		Rhode Island	★		
Iowa			★	South Carolina			★
Kansas			★	South Dakota		★	
Kentucky	★			Tennessee		★	
Louisiana	★			Texas		★	
Maine			★	Vermont			★
Maryland	★			Virginia			★
Massachusetts			★	Washington		★	
Michigan		★		West Virgina			★
Minnesota			★	Wisconsin			★
Mississippi			★	Wyoming			★
Missouri			★				

* Replies received in a survey conducted by the Council of State Governments indicate that voting machines are not used in Idaho, Nebraska, Puerto Rico, Utah and the Virgin Islands.

Source: Book of the States, 1968-69, published by Council of State Governments, Chicago, Ill.

SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1969.

No. 1069.

THOMAS K. GILHOOL, et al.,
Appellants,

v.

CHAIRMAN AND COMMISSIONERS, PHILADELPHIA COUNTY BOARD OF ELECTIONS, et al.,
Appellees.

On Appeal from the United States District Court for the Eastern District of Pennsylvania.

MOTION TO DISMISS.
MOTION TO AFFIRM.

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INDEX

	PAGE
Motion to Dismiss	2
Statement	3
Argument	4
Alternative Motion to Affirm	10
Statement	11
Argument	12
I. The Disposition of the Instant Appeal is Squarely Controlled By Voorhees v. Dempsey, 379 U. S. 648, 85 S. Ct. 612, 13 L. Ed. 2d 552 (1965)	12
II. The Proposition That Straight Party Levers Do Not Violate the Constitution Is So Patently Clear that the Case Does Not Require Further Argument	14
Appendix A	20

TABLE OF CITATIONS

CASES:

Brock v. Helton, 395 S. W. 2d 765 (Ct. of App. in Kentucky, 1965)	16
Brockington v. Rhodes, —— U. S. ——, 90 S. Ct. ——, 24 L. Ed. 2d 209 (1969)	6, 7, 8
Cahir v. Cote, 72 R. I. 49, 188 A. 2d 316 (1946)	16
Cobb v. Board of Commissioners, 155 Fla. 60, 19 So. 2d 505 (1944)	16
Golden v. Zwickler, —— U. S. ——, 89 S. Ct. ——, 22 L. Ed. 2d 113 (1969)	5, 6

PAGE

Hall v. Beals, —— U. S. ——, 90 S. Ct. —, 24 L. Ed. 2d 214 (1969) 8, 9

MacDougall v. Green, 335 U. S. 281, 69 S. Ct. 1, 93 L. Ed. 2d 3 6

Moore v. Ogilvie, —— U. S. ——, 89 S. Ct. —, 23 L. Ed. 2d 1 (1969) 6

Morrison v. Lamarre, 75 R. I. 176, 65 A. 2d 217 (1949) 16

Oughton v. Black, 61 A. 346, 212 Pa. 1, 5, 6 (1905) ... 15

State v. Martin, 21 Mont. 403, 62 Pac. 588 (1900) 13

State ex rel. Satti v. Grasso, 27 Conn. Sup. 67, 229 A. 2d 703 (1966) 16

State ex rel. Sawyer v. Neffner, 137 Ohio St. 309, 29 N. E. 2d 515 (1940) 16

State v. Wait, 92 Neb. 313, 138 N. W. 159 (1912) 16

Todd v. Board of Election, 104 Mich. 474, 62 N. W. 564, 64 N. W. 496 (1895) 15, 16

Voorhees v. Dempsey, 231 F. Supp. 975 (D. Conn., 1964), affirmed at 379 U. S. 648, 85 S. Ct. 612, 13 L. Ed. 2d 552 (1965) 10, 12, 13, 14, 15, 18

STATUTES:

28 U. S. C. A. 1253 3

28 U. S. C. A. 1331 ..... 5, 8

28 U. S. C. A. 1343(3) 5, 8

28 U. S. C. A. 2111 18

28 U. S. C. A. 2201, et seq. (Declaratory Judgment Act) 5, 6, 8

INDEX

RULES OF PROCEDURE:

PAGE

Rule of Supreme Court of the United States, Rule 16 ... 1

Federal Rules of Civil Procedure, Rule 12(b)(6), 61 ... 18

Federal Rules of Civil Procedure, Rule 65(a)(2) ... 18

OTHER AUTHORITIES:

Campbell and Miller, "The Motivational Basis of Straight and Split Ticket Voting", 51 American Political Science Review 293 (1957) ... 16

Walker, "Ballot Forms and Voter Fatigue, an Analysis of the Office Block and Party Column Ballots", 10 Midwest Journal of Political Science 448 (1966) ... 16, 17

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969.

No. 1069.

THOMAS K. GILHOOL, ET AL.,
Appellants,

v.

CHAIRMAN AND COMMISSIONERS, PHILADELPHIA COUNTY BOARD OF ELECTIONS, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

MOTION TO DISMISS.
MOTION TO AFFIRM.

MOTION TO DISMISS.

Pursuant to the provisions of Rule 16(1)(d) of the Rules of the Supreme Court of the United States, appellees move to dismiss the instant appeal on the ground that the questions presented by appellants in their Jurisdictional Statement are moot.

STATEMENT.

This is a direct appeal from the final judgment of the three-judge panel for the Eastern District of Pennsylvania entered on October 17, 1969, which judgment dismissed plaintiffs' (appellants) complaint in this case.

The matter came before the District Court on an application for a preliminary injunction, and after hearing testimony for several days, the District Court denied the application and dismissed the complaint. Pursuant to 28 U. S. C. 1253, appellants have taken the instant appeal.

ARGUMENT.

Appellants in their Jurisdictional Statement to this Court present two questions for review: (1) the constitutionality of the Pennsylvania election requirement that straight party levers must be provided on all voting machines, and (2) whether appellants were unlawfully denied a final hearing on that issue after their application for a preliminary injunction was denied.

Appellants' complaint is artfully drawn and consists of twenty-two (22) paragraphs divided into five subheadings as follows: jurisdiction, plaintiffs, facts underlying the cause of action, and allegations of law. The fifth subheading is relief, and reads as follows:

RELIEF.

"Plaintiffs will suffer irreparable harm if defendants are permitted to prepare and use ballots and voting machines to utilize straight party voting at the November special elections, for which the remedy at law will be inadequate.

WHEREFORE, plaintiffs demand

(a) that a three-judge district court be promptly convened to hear and determine this action;

(b) that the court declare unconstitutional the use of straight-party voting in the special elections for councilman from the First and Seventh Councilmanic Districts to be held on November 4, 1969;

(c) that the court grant preliminary and permanent injunctive relief preventing defendants, their agents, servants, employees and those acting in concert with them from preparing or utilizing voting machines or ballots in the November 4, 1969, special elections employing straight party lever voting for the offices of Councilman in the First and Seventh Councilmanic Districts, or from conducting the election in any other manner causing discrimination against independent can-

didates for City Council, their supporters or those voting for such candidates; and

(d) that the said court grant any other necessary or appropriate relief in the circumstances."

Thus, while the complaint requests a permanent injunction and other appropriate relief, it is obvious that the only relief requested from the District Court is relief in conjunction with the special election to be held on November 4, 1969, which election has been held and the results certified by the Philadelphia County Board of Elections.

With respect to the parties, paragraphs three and four of the complaint state that plaintiffs Gilhool and Hackett may be independent candidates at the special election on November 4, 1969. Paragraph five of the complaint states that three of plaintiff-voters (Rev. Sloan, Messrs. Floyd and Yale) are registered Democrats and "presently wish to elect Gilhool". Paragraph six of the complaint states that two of the plaintiff-voters (McCullough and Fisher) are registered Republicans and "presently wish to elect Gilhool". Paragraph seven of the complaint states that two of the plaintiff-voters (Paonessa and House) "have not yet decided for whom they will vote, and may wish to help independent candidates in the special elections who will not have received any party nomination". Paragraph eight sets forth the party-defendants.

Thus, the complaint fails to set forth, so far as the parties are concerned, any injury to any of them that will continue beyond the special election of November 4, 1969.

Finally, the complaint alleges in its Jurisdictional section that it is a suit for a declaratory and injunctive relief "in connection with special elections which will be held on November 4, 1969. . . ." Jurisdiction is predicated on 28 U. S. C. A. 1331 and 1343(3); the complaint fails to mention anywhere the Declaratory Judgment Act, 28 U. S. C. A. 2201.

Appellees submit that this case is moot under the doctrine of *Golden v. Zwickler*, —— U. S. ——, 89 S. Ct. ——, 22 L. Ed. 2d 113 (1969), where the Court held that declaratory

relief is not available where it was "most unlikely" that an actual controversy between the parties would ever rise again. The unanimous Court in *Golden* emphasized that the "allegations of the complaint focus upon the then forthcoming 1966 election. . . ." *Golden v. Zwickler*, 22 L. Ed. 2d at p. 118, and as that election was over, there was no relief which could be granted under the Declaratory Judgment Act, 28 U. S. C. A. 2201.

In the instant appeal, as in *Golden*, the complaint in terms of its allegations of jurisdiction, parties, and relief is only concerned with the special election held in Philadelphia on November 4, 1969. As that election is history, there is no substantial continuing controversy between parties having adverse legal interests, and the case is moot. *Golden v. Zwickler*, supra.

Notwithstanding the fact that appellants' complaint fails to allege any injury to any party that will continue beyond November 4, 1969, appellants rely only on *Moore v. Ogilvie*, — U. S. —, 89 S. Ct. —, 23 L. Ed. 2d 1 (1969), for the proposition that the instant case is not moot.

Appellees submit that *Moore v. Ogilvie*, supra, is not on point here for three reasons. First, the complaint in the instant case seeks only injunctive relief prior to November 4, 1969, and the complaint alleges no injury nor requests any relief for any action after that date. Second, *Moore* requested relief in the form of a declaratory judgment under 28 U. S. C. 2201 while the instant complaint requests routine equitable relief. Third, the Court in *Moore* was concerned with a rather obvious violation of its "one-man one-vote" principle, and that violation was "capable of repetition, yet evading review" because the district courts were relying on the "indistinguishable" *MacDougall v. Green*, 335 U. S. 281, 69 S. Ct. 1, 93 L. Ed. 2d 3, which upheld the Illinois voting system at issue in *Moore*. In the instant appeal, there is no problem which could not be adequately raised by a declaratory judgment suit.

That *Moore* does not govern this case is further evidenced by this Court's subsequent decision in *Brockington v.*

Rhodes, —— U. S. ——, 90 S. Ct. ——, 24 L. Ed. 2d 209 (1969). In *Brockington*, this Court unanimously dismissed as moot a constitutional challenge to the then requirement of Ohio law that an independent's nominating petition for election to the U. S. House of Representatives must contain seven percent of the qualified voters in the district. While the appeal was pending in this Court, Ohio amended her laws to require only four percent of the relevant voters on the nominating petition. The Court specifically noted that "We do not think that the recent statutory amendment has rendered this case moot." *Brockington v. Rhodes*, —— U. S. ——, 24 L. Ed. 2d at p. 212.

Rather, in *Brockington* the Court held that the case was moot on another basis: (1) the injury (i.e., failure to accept nominating petitions) was not alleged to continue beyond the date of the election (i.e., no allegation that appellants would file future nominating petitions) and no relief was sought beyond that date, and (2) the election was over.

> "Rather, in view of the limited nature of the relief sought, we think the case is moot because the congressional election is over. The appellant did not allege that he intended to run for office in any future elections. He did not attempt to maintain a class action on behalf of himself and other putative independent candidates, present or future. He did not sue for himself and others similarly situated as independent *voters*, as he might have under Ohio law. Ohio Rev. Code Ann. §2307.21 (1953). He did not seek a declaratory judgment, although that avenue too was open to him. Ohio Rev. Code Ann. §§2721.01-2721.15 (1953)." *Brockington v. Rhodes*, 24 L. Ed. 2d at p. 212. (Emphasis in original.)

Significantly, the instant complaint does not allege any injury to any appellant that will continue in the future beyond November 4, 1969. And while the instant complaint states a class action on behalf of two prospective independent candidates (paragraphs three and four); and voters who "wish" to vote for one of the two independent candidates

(paragraphs five and six), and voters who "have not yet decided for whom they will vote, and may wish to help elect independent candidates in the special elections. . . ." (paragraph seven), the complaint is *absolutely devoid* of any allegation of any injury to either prospective candidates or voters beyond November 4, 1969. Finally, the "relief" subsection of the complaint requests no declaratory relief, and the "jurisdiction" subsection of the complaint states jurisdiction rests on 28 U. S. C. 1331 and 1343(3). That is, jurisdiction was not predicated on the Declaratory Judgment Act, 28 U. S. C. 2201. Thus, the instant complaint requests no relief for any party beyond November 4, 1969.

Appellee submits that where (1) appellants request only relief with respect to a specific election, and (2) allege no facts of a continuing injury to them after that election, and (3) that election is history, then the case is moot under *Brocktington v. Rhodes*, supra.

This Court further emphasized in *Hall v. Beals*, —— U. S. ——, 90 S. Ct. ——, 24 L. Ed. 2d 214 (1969), the futility of the Court's deciding cases where its mandate can have no practical or realistic effect on the rights asserted by the parties. Thus, in *Hall*, the Court dismissed as moot a challenge to the six-month residency requirement of the Colorado election laws where Colorado had amended her laws to require only two-month residency during the litigation, and that amendment would have allowed appellants to vote in the challenged election. In holding that the case was moot, *Hall* emphasized that the relief requested was only in terms of the then forthcoming 1968 presidential election, and thus, "it is now impossible to grant the appellants the relief they sought in the District Court." *Hall v. Beals*, —— U. S. ——, 24 L. Ed. 2d at p. 217. Further, the Court stated that appellants' general objection to residency clauses did not alter the fact that the case was moot:

". . . the appellants' opposition to residency requirements in general cannot alter the fact that so far as they are concerned nothing in the Colorado legislative scheme as now written adversely affects either their present interests, or their interests at the time this litigation was commenced. Nor does the result differ because the appellants denominated their suit a class action on behalf of disenfranchised voters. The appellants 'cannot represent a class of whom they are not a part', *Bailey v. Patterson*, 369 U. S. 31, 32-33, 7 L. Ed. 2d 512, 82 S. Ct. 549, that is, the class of voters disqualified in Colorado by virtue of the new two-month requirement, a class of which the appellants have never been members." *Hall v. Beals*, , U. S. —, , 24 L. Ed. 2d at p. 218.

In the instant case, as in *Hall*, it is "now impossible" for any Court to grant the relief sought in the appellants' complaint as that complaint speaks only in terms of relief at the November 4, 1969, election. Further, as the instant complaint alleges no injury to any of the party-plaintiffs (appellants) that continues beyond November 4, 1969, it follows under *Hall* that appellants cannot represent that class (i.e., persons injured beyond November 4, 1969, assuming there are any) as appellants have not alleged that they are members of that class.

For the foregoing reasons, it is requested that the Court dismiss the instant appeal as moot.

ALTERNATIVE MOTION TO AFFIRM.

Pursuant to the provisions of Rule 16(1)(c) of the Rules of the Supreme Court of the United States, appellees alternatively move to affirm the decision of the court below for the following reasons:

1. The disposition of the instant appeal is squarely controlled by *Voorhees v. Dempsey*, 379 U. S. 648, 85 S. Ct. 612, 13 L. Ed. 2d 552 (1965).

2. The proposition that straight party levers do not violate the Constitution is patently clear, and thus the question presented is so insubstantial as not to require further argument.

STATEMENT.

Appellants in their Jurisdictional Statement present only one Constitutional issue for decision: the Constitutionality of the Pennsylvania Election Code provision that all political parties must have a party lever by means of which a voter can vote for all the candidates of that party in one operation.[1]

Appellants admit in their Jurisdictional Statement that an "informed" voter would have no confusion or problem in selecting the candidates for whom he wants to vote without regard to the presence or absence of party levers (Appellants' Jurisdictional Statement, p. 14).

Additionally, appellants do not argue that the presence of a party lever ever caused any voter to vote for a candidate *unintentionally*; rather, appellants' argument is limited to the amorphous proposition that the presence or absence of a party lever will cause a shift of voting patterns.

The mechanics of voting in Pennsylvania may be summarized as follows. The voter's ballot is "opened" when he pulls a large two-foot lever which closes the curtain behind him. Thereafter, the voter can as a practical matter do either of three things: (1) pull the party lever which automatically pushes down all the individual levers of all candidates on that party; (2) pull the party lever as described above, and then push up the individual handle(s) of candidate(s) in that party for whom he does not wish to vote, and then push down the individual handle(s) of a candidate(s) for the same office in another party for whom he intends to

---

[1] 25 Purdons' Pa. Stat. Ann. Section 3010(b) provides in relevant part as follows:

> "The names of all candidates of a political party shall appear in the same row or column, and no other names shall appear in the same row or column, to the left or top of which shall be a straight party lever, by means of which an elector may, in one operation, vote for all the candidates of that political party for every office to be voted for . . ." Pennsylvania Election Code, Act of 1937, P. L. 1333, Art. XI, §1110(b).

vote; or (3) push down the handles of individual candidate(s) but never touching a party lever.

The vote is not registered until the voter pulls back the large handle to open the voting curtain. Until that happens, the voter is free to push up or down the individual levers of candidates for whom he wants to vote or not to vote. The voter could in fact pull a party lever, and thereafter reject all the candidates of that party by pushing up the individual levers of all of that party's candidates.

The "Instructions to Voters" clearly and adequately explained the voting procedure to the voters. (See footnote 6, Opinion of the Court, Appellants' Jurisdictional Statement, p. 26.)

Again, by emphasis, Pennsylvania law requires that all parties have a party lever by means of which a voter may vote for all candidates of that party in one operation. Of course, whether a party slates candidates for all open offices is a factor over which the state has no control.

ARGUMENT.

I. THE DISPOSITION OF THE INSTANT APPEAL IS SQUARELY CONTROLLED BY VOORHEES v. DEMPSEY, 379 U. S. 648, 85 S. CT. 612, 13 L. ED. 2d 552 (1965).

In *Voorhees v. Dempsey*, 231 F. Supp. 975 (D. Conn., 1964), three Connecticut voters brought an action challenging the constitutionality of the mandatory requirement of Connecticut law that a voter must pull a party lever in order to open his ballot.* See General Statutes of Connecticut, Rev. of 1958, Section 9-242. Thereafter, of course, the Connecticut voter was free to "change his vote" by pushing up the individual levers (even all of them) of candidates for whom he did not wish to vote, and pulling down the individual levers of other candidates for whom he intended to

* Under Pennsylvania law, the ballot is opened by pulling a large lever which closes the curtain.

vote. The statute was challenged in part on the ground that it "subjects independent voters to more burdensome conditions than party voters. . . ." *Voorhees v. Dempsey*, 231 F. Supp. at p. 976. In granting defendants' motion to dismiss, the three-judge district court held as follows:

> "The utilization of party levers, be they optional or mandatory, discriminates against the independent voter to the extent the latter must spend more time and effort to vote for the same number of candidates than one who votes for a straight ticket. However, there is a rational basis for this discrimination, for the party lever simplifies and speeds up the voting process for large numbers of voters. . . . We are unable to see that the slight extra effort required for an independent voter to pull a party lever and reject candidates for whom he does not care to vote constitutes such a burdensome and unreasonable discrimination that the independent voter is deprived of the equal protection of the laws." 231 F. Supp. at p. 977.

On appeal to this Court, Connecticut's (appellees) motion to affirm was granted in a Per Curiam opinion. *Voorhees v. Dempsey*, 379 U. S. 648, 85 S. Ct. 612, 13 L. Ed. 2d 552 (1965).

Appellants' attempt to distinguish *Voorhees* on the ground that the complaint there did not allege that straight-party levers "changed votes". Rather, as appellants read *Voorhees*, the case only involved the contention that straight-party levers make voting for independent candidates more time consuming and more laborious. A reading of the "Questions Presented" in appellants' Jurisdictional Statement submitted in *Voorhees* clearly reveals that the issue of change in votes was presented to the Court.[3] As the court below prop-

[3] "QUESTIONS PRESENTED

* * * * * * *

C. Whether the mandatory party lever established by the Connecticut General Statutes denies the plaintiffs their right to free selection by placing upon them mental and psychological pressure to merely and solely pull a party lever.

* * * * * * *

ctly recognized, the Pennsylvania system where the voter need never touch any party lever presents *"even less disadvantage* to the independent candidates than there was in the *Voorhees* case since any voter [in Pennsylvania] desiring to vote for such a candidate can do so by either turning the party lever at the head of the column in which the candidate's name appears or by pulling the lever which is next to his name" (Opinion of the Court, Appellants' Jurisdictional Statement, Appt. A., p. 31a). (Emphasis supplied.).

Accordingly, it is submitted that *Voorhees v. Dempsey*, supra, squarely controls the disposition of the instant appeal and the Court should grant the motion to affirm on that basis.

II. THE PROPOSITION THAT STRAIGHT PARTY LEVERS DO NOT VIOLATE THE CONSTITUTION IS SO PATENTLY CLEAR THAT THE CASE DOES NOT REQUIRE FURTHER ARGUMENT.

Appellants in their Jurisdictional Statement argue that the mere presence of a party lever gives "political" parties and their candidates an unconstitutional advantage over "independent" parties and candidates in that the voters of the former have a more simplified, convenient, and less time-consuming voting process than that required of the "independent" voters.

Appellees do not quarrel with the statement that it is easier to vote a straight-party ticket than an "independent" ticket, and this fact is so even in those states which require individual candidates of a party to be listed together but do not provide party levers.

---

2. Whether the mandatory party lever established by the Connecticut General Statutes deprives independent voters of said state equal protection of the laws.

3. Whether the mandatory party lever in class legislation establishing a preferred group of voters with privileges and immunities not granted to other voters.

Appellants cite no case which remotely suggests that straight-party levers violate the Constitution. The only Federal case discussing straight-party levers, *Voorhees v. Dempsey*, supra, holds that they are constitutionally permissible.

Among the various states of the Union, at least twenty-six (26) states have election laws requiring that each party have a party lever by means of which a voter can vote for all candidates of that party in one operation. (See Appendix A.)

The Supreme Court of Pennsylvania sustained the constitutionality of straight-party levers in *Oughton v. Black*, 61 A. 346, 212 Pa. 1, 5 (1905), where the Court stated as follows:

> "The free and equal exercise of the elective franchise by every elector is not impaired by the statute, but simply regulated. A regulation for the convenience of certain electors providing that they may,—not must,—if they desire to vote a straight party ticket, vote for it by making a cross in the square opposite the name of the party of their choice is not inequality as against these complainants. They have the right to vote in precisely the same way for all of the candidates on the Municipal League ticket."

The Supreme Court of Michigan sustained the use of party levers against the contention that they provided a more convenient method of voting for some than others in *Todd v. Board of Election*, 104 Mich. 474, 62 N. W. 564, 64 N. W. 496 (1895), where the Court stated as follows:

> "The test of the constitutional freedom of elections is the freedom of the elector to deposit his vote as the expression of his own unfettered will, guided only by his own conscience as he may have had it properly enlightened. Tried by this, the only test, it cannot reasonably be said that because one voter may more quickly prepare his ballot than another the election is not free to both alike. Each votes as freely as the other, but, in

> doing so, the one who, in a spirit of independence, and in the exercise of his absolute right to be independent, makes up his own ballot, must and does consume more time than the other. This, however, is no interference with his freedom as an elector. It is the very freedom of the election that enables him to mark his ticket just as he pleases, or to make it up without regard to any name that may appear as a candidate on the ballot handed to him. This need be pursued no further and the only question to be considered is the alleged inequality of elections." 64 N. W. at p. 496.

The use of party levers against the contention that they somehow discriminate against others has been sustained in the following decisions: *Morrison v. Lamarre*, 75 R. I. 176, 65 A. 2d 217 (1949), and *Brock v. Helton*, 395 S. W. 2d 765 (Ct. of App. of Kentucky, 1965). Very clear language in other cases also upholds the use of party levers: *State v. Martin*, 24 Mont. 403, 62 Pac. 588 (1900); *State v. Wait*, 92 Neb. 313, 138 N. W. 159 (1912); and *State ex rel. Sawyer v. Neffner*, 137 Ohio St. 309, 29 N. E. 2d 515 (1940); *Cobb v. Board of Commissioners*, 155 Fla. 60, 19 So. 2d 505 (1944); *Cahir v. Cote*, 72 R. I. 188, 49 A. 2d 316 (1946); *State ex rel. Satti v. Grasso*, 27 Conn. Sup. 67, 229 A. 2d 703 (1966).

No case that appellees' research has disclosed has held or suggested that party levers violate the United States Constitution.

With respect to appellants' argument on discrimination, Pennsylvania vigorously denies that there is any discrimination present on this ballot. All parties are treated equally when each party is given its required party lever which votes for all its candidates in one operation.

Appellants rely heavily on two articles[1] to support the

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[1] Campbell and Miller, "The Motivational Basis of Straight and Split Ticket Voting", 51 American Political Science Review 293 (1957);

Walker, "Ballot Forms and Voter Fatigue, An Analysis of the Office Block and Party Column Ballots", 10 Midwest Journal of Political Science 448 (1966).

proposition that party levers somehow discriminate against independent candidates and voters. First, neither article states that any citizen votes or fails to vote for any candidate because of a party lever. Rather, the articles conclude that where a party lever is not present, the voter is more inclined to split his ticket. However, the voter intends to vote in all cases for the candidates for whom he does in fact cast his vote.

Appellants fail to mention that one authority states that the absence of party levers may result in the partial disenfranchisement of thousands of voters who intended to vote for a candidate for each open office, but through ignorance, confusion, or "fatigue" did not.

> "In a pioneering study completed in 1956 H. M. Bain and D. S. Hecock showed conclusively that no matter what ballot form was used candidates whose names were listed at the top of the ballot gained substantial advantage merely from having that position. They also demonstrated that the more complex the configuration of voting machines the greater were the number of ballots which were improperly or incompletely marked.
>
> * * * * * * * *
>
> During the last decade evidence has been gathered from survey research which demonstrates that split-ticket voting does increase when an Office Block ballot is used, but it increases among those voters least able to make informed, rational political decisions. Our analysis in this study also indicates that the Office Block ballot significantly increases voter fatigue, especially among the same poorly educated, badly informed voters who are encouraged to split their tickets. Both aggregate and individual data from several different sources all point in this direction. The more complex the design of the ballot, the greater the tendency for voters to neglect races at the bottom of the ticket." Walker, op. cit., p. 450, 462.

Finally, and what is most significant, neither article states that any voter ever declined to split his ticket because he had previously pulled a party lever.

Aside from the fact that the absence of a party lever could result in the partial disenfranchisement of a voter intending to vote for a full slate of candidates, numerous other factors might persuade a state to provide party levers: they speed up the voting process and reduce the cost of additional machines, they encourage citizens to vote by their simplicity and convenience (even on split tickets), they tend to remove possible total disenfranchisement where the voter spoils his ballot, they assure a swift and convenient method for thousands to vote for the candidates of their choice (even on split tickets), and they tend to eliminate the occurrence of jammed voting machines.

Appellants present one final argument with respect to their right to a final hearing under Fed. R. Civ. Pro. 65(a)(2). Procedurally, appellant presented numerous issues to the court below: the relationship between general and special elections under Pennsylvania law, the instructions to voters, "spatial gaps" in the ballot, etc. The only constitutional issue presented on appeal to this Court is the validity of straight-party levers. As to that issue, appellees had filed a motion to dismiss for failure to state a claim, see Fed. R. Civ. Pro. 12(b)(6), upon which the court below did not specifically pass, but rather dismissed the complaint after the preliminary hearing.

In any event, the failure of the lower court to grant a final hearing to appellants on the issue of the constitutionality of straight-party levers was harmless error which did not affect the substantial rights of the appellant under 28 U. S. C. 2111, 28 U. S. C. A. 2111. See also Fed. R. Civ. Pro. 61. Technically, the district court should have granted the appellees' motion to dismiss which was the procedure in *Voorhees v. Dempsey*, supra. In essence, the order dismissing the complaint granted appellees' motion to dismiss, and the failure of the district court to hold a final hearing did not affect any substantial rights of appellants on the issue here.

For the foregoing reasons, appellees request that the Court grant their motion to affirm.

Respectfully submitted,

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Appendix A.

The Following States Require Straight-Party Levers for All Parties:

Alabama—Code of Ala., Tit. 17, §97, 157.
Arizona—Ariz. Rev. Stat., Tit. 16, §344, 793A.
Arkansas—Ark. Stat. Ann., Tit. 3, §1203 (1969 Supp.).
Connecticut—Conn. Gen. Stat. Ann. §9-276, 277.
Delaware—15 Del. C. §4940, 4972, 4974.
Georgia—Ga. Code Ann., Tit. 34, §1103(b).
Illinois—Ill. S. H. Ann. Stats., Chap. 46, §17-11, §24-1, §24A-16.
Indiana—Burns' Ind. Stats. Ann. 29-5021, 5218.
Iowa—Iowa Code Ann. 49.91, 49.97.
Kentucky—Baldwin's Ky. Rev. Stats. Ann., Tit. X, §118.230(2).
Louisiana—West's La. Stats. Ann. Rev. Stats. 18:671, 18:1168(3).
Maine—21 Maine Rev. Stats. Ann. §922, 1038.
Michigan—Mich. Stats. Ann. §6.1706, 1775.
Missouri—Vernon's Ann. Mo. Stats. (supp.), §111.451, 111.311.
New Hampshire—N. H. Rev. Stats. Ann., §59.58.
New Mexico—N. M. Stat. (supp.), 3-9-3(b), 3-12-19(a).
North Carolina—Gen. Stat. N. C. (supp.), Chap. 163, §163-151(a).
Oklahoma—Okla. Stat. Ann. Tit. 26 (supp.), §274,371.
Pennsylvania—25 Purdon's P. Stat. Ann. 2910(b).
Rhode Island—R. I. Gen. Laws (1956 supp.), Tit. A, §19-15.
South Carolina—Code of Laws of S. C. (1962), §23-404, §23-409, 12 (1968 supp.).
Texas—Vernon's Ann. Civ. St. (supp.), Art. 6.06, 7.14(8).
Utah—Utah Code Ann. Tit. 20, 7-20, 7-21, 18-4.
Vermont—17 Vermont Stat. Ann. 1043, 1036.
West Virginia—W. V. Code, Chap. 3, 3-4-3(8), 3-6-5(a).
Wisconsin—Wis. Stats. Ann. 5.37(1), 5.64(1).

SUPREME COURT OF THE UNITED STATES

October Term, 1969

GILHOOL ET AL. *v.* CHAIRMAN AND COMMISSIONERS ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR EASTERN DISTRICT OF PENNSYLVANIA

Nos. 1069. Decided March 2, 1970

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.